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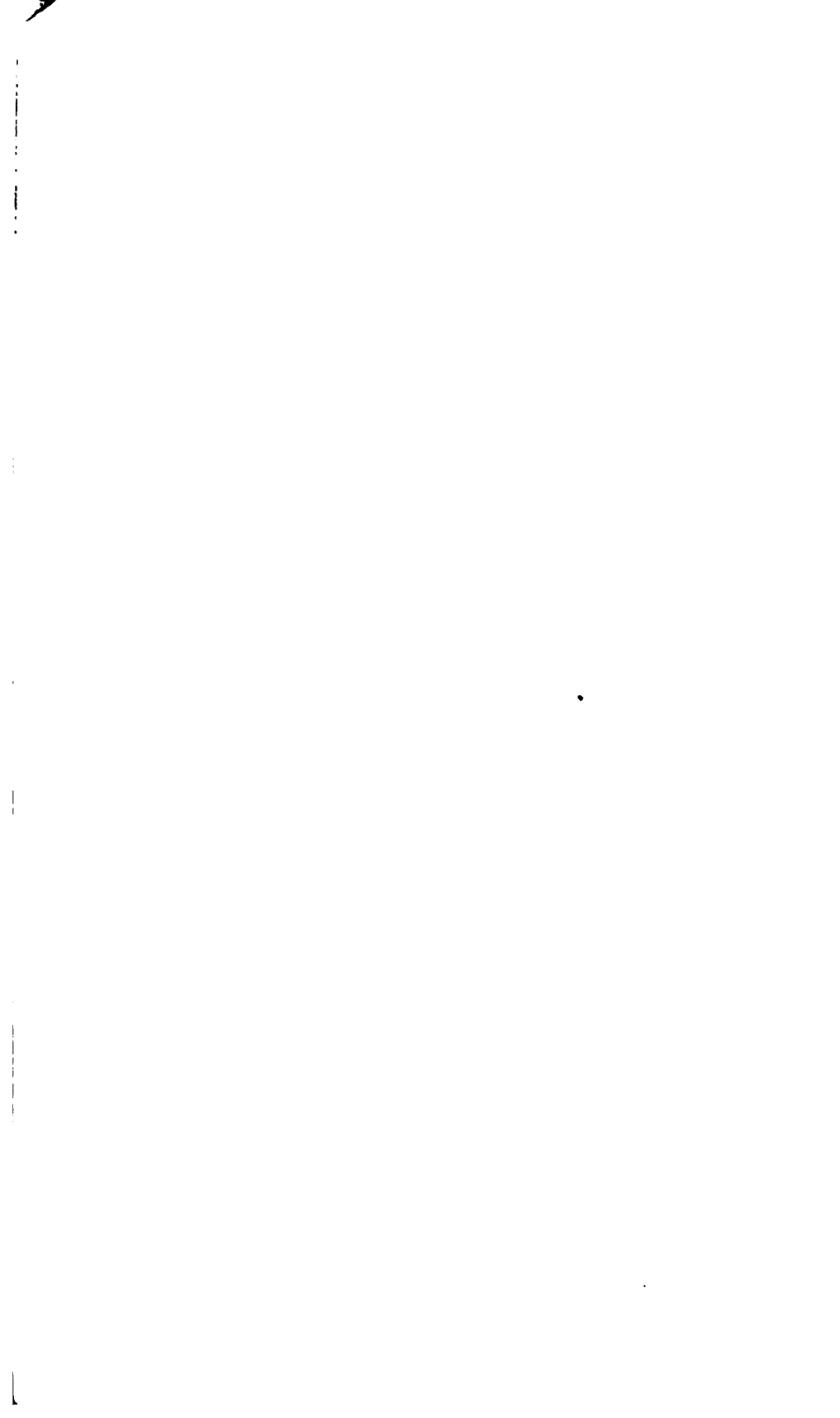
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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
COURT OF KING'S BENCH;

WITH
TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY EDWARD HYDE EAST, ESQ.,
OF THE INNER TEMPLE, BARRISTER AT LAW.

*Si quid novisti rectius istis,
Candidus imperti: si non, his utere mecum.*—HON.

SIXTEEN VOLUMES IN EIGHT.

VOLUME IV.

EMBRACING VOLS. VII. AND VIII. OF FORMER EDITIONS,

AND CONTAINING

THE CASES OF MICHAELMAS, HILARY, EASTER AND TRINITY TERMS IN THE
FORTY-SIXTH, AND OF MICHAELMAS, HILARY, EASTER AND TRINITY TERMS
IN THE FORTY-SEVENTH YEAR OF GEORGE III....1805-6-7.

SECOND AMERICAN EDITION,
WITH THE ADDITION OF NOTES AND REFERENCES.

BY G. M. WHARTON.

PHILADELPHIA:
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JUDGES
OF THE
COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

EDWARD LORD ELLENBOROUGH, Chief Justice.
SIR NASH GROSE, Kn't.
SIR SOULDEN LAWRENCE, Kn't.
SIR SIMON LE BLANC, Kn't.

ATTORNEYS-GENERAL.
The Honourable SPENCER PERCEVAL.
SIR ARTHUR PIGGOTT, Kn't.
SIR VICARY GIBBS, Kn't.

SOLICITORS-GENERAL.
SIR VICARY GIBBS, Kn't.
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CASES

IN

MICHAELMAS TERM,

IN THE FORTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

Lane v. Cobham and two Others.

7 East, 1. Nov. 8, 1805.

Though a parish had at no time antecedent to the years 1773-5 had the benefit of the stat. 43 Eliz. c. 2. but had always had five overseers of the poor appointed separately, two for one district, two for another, and one for a third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period who had been appointed for the whole parish, the Court held that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the stat. 43 Eliz. : and consequently, that a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal.

IN trespass for taking and converting the plaintiff's goods, to which the general issue was pleaded, it appeared that the action was brought to try the validity of a poor rate against the two justices who granted the warrant of distress under which the plaintiff's goods were taken, and one of the parish officers of *Wokingham*, in the counties of *Wilts* and *Berks*, who procured and executed such warrant; and the question was, whether the rate in dispute, made by four overseers appointed for the whole parish, were good; or whether there ought not to have been three several rates for so many distinct divisions of the parish made by separate respective overseers of the poor of each division? At the trial before *Graham, B.* at the last assizes for *Salisbury*, it was proved, that from all antecedent time down to the year 1773, the parish at large of *Wokingham* had been in fact divided into three districts, each of which had maintained their own poor separately; one consisting of the corporate town of *Wokingham*, which lay for the most part in the county of *Berks*, with a small part in the county of *Wilts*; the second consisting of the remaining part of the parish, which lay in the county of *Berks*; the third called the *Wiltshire* liberty, lying in *Wilts*(a): that during that time there had always been separate overseers of the poor for each part, two for the town, and two for the *Berkshire* part of *Wokingham*, and one for *Wilts*; separate rates, and separate constables appointed; and there had been removals of paupers and certificates granted from each of the several parts to the others. That in the year 1773, the town of *Wokingham* and the *Berkshire* district agreed to unite, and invited the *Wilts* district to accede to the union, and that

(a) The parish was proved at the trial to be five miles long, three broad, and eighteen in circumference.

the latter came into the agreement in 1775; and that, for the purpose of sanctioning as far as might be such union, a mandamus was applied for to the Court of King's Bench, commanding two justices of the peace to appoint four overseers for the whole parish, to which no opposition or return was made: and that from that period down to the present time there had always been four overseers and no more appointed for the whole parish, who had made one rate accordingly, and had in all respects conformed themselves to the stat. 43 Eliz. c. 2. The learned Judge was therefore of opinion at the trial, that it was competent to the inhabitants of the parish in the years 1773 and 1775 to come to the agreement which they did, (laying no stress on the mandamus, which he thought arose out of that agreement) such agreement being in conformity to the general provisions of the stat. 43 Eliz. for the management of the poor, from which the parish had deviated without authority from that period to the passing of the act of the 13 & 14 Car. 2. c. 12. s. 21. which first sanctioned such a deviation; but that they were not bound to continue under the direction of the latter statute, if in point of fact the parish could avail itself of the provisions of the general antecedent law; the statute 13 & 14 Car. 2. only applying to such parishes as *have not* and *cannot* reap the benefit of the stat. 43 Eliz.; and that in the present case, he thought that the uninterrupted usage for the last 30 years went to show that the parish could have, because they had in fact had, the benefit of the stat. 43 Eliz.; on which ground he directed the jury to find a verdict for the defendants. The jury accordingly found for the defendants under that direction, but found also as a fact, that prior to the agreement in 1773—5 the three districts had always maintained their poor separately under separate overseers. And the plaintiff had liberty to move the Court to set aside the verdict, and grant a new trial, if the direction given to the jury were wrong in point of law. Accordingly,

Lens Serjt. and *East* now applied for a rule for that purpose; contending that the agreement in 1773—5 on the part of the parishioners to have but four overseers, and to maintain their poor altogether, was not binding where it appeared that from all time antecedent the parish had not had the benefit of the stat. 43 Eliz., but had been regulated by the provisions of the stat. 13 & 14 Car. 2. from the time when their ancient usage received the sanction of that act, which thenceforth became the law of the parish; and that the modern usage of the last 30 years, originating by agreement, could not alter the prior law and custom of the parish; but that the question must be considered now in the same manner as it would have been at the time when the agreement was made, and was so stated by the learned judge to the jury: and that it was competent now, as it would have been then, for any of the parishioners to revert to the ancient law and custom of the parish to maintain its poor in separate districts. That the words of the stat. 13 & 14 Car. 2. applying to parishes which *had not* nor *could* reap the benefit of the stat. 43 Eliz. could not be understood to mean a physical impossibility of managing the poor by four overseers, but that they could not properly do so without more; and that was evidenced in this case by the long antecedent usage grown into the law of the parish at the time when the agreement in question was entered into, and by the fact proved at the trial that two overseers were still chosen *alternately* for the town of *Wokingham* and the *Berkshire* part of the parish, and one for each of the others, though the four when chosen were appointed for the whole parish. And that if the regulations of the statute of Car. 2. once adopted could be departed from, it would open a door to continual disputes and inconvenience.

The Court, however, were clearly of opinion, that the question was proper to be left to the jury, and that it was in their province to decide whether the parish under these circumstances could have the benefit of the stat. 43 Eliz.; and there was no evidence to show that they could not, opposed to the weight of a usage for 30 years past to show that they might have, and actually had

enjoyed the benefit of it. That the agreement in 1773—5 showed, that in the opinion of the parishioners of that period they might have the benefit of that statute, and it now appeared that in point of fact they have acted under it ever since. There therefore seemed to be no reason for disturbing the practice which had prevailed for so long time, or for scrutinizing every part of the direction, when the learned Judge's opinion and the verdict of the jury were substantially right.

Rule refused.

McCombie v. Davies.

7 East, 5. Nov. 11, 1805.

Where a broker *pledges* the goods of his principal as his own, the pawnee who claims by such *tortious* act of the broker, cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession as his servant for the preservation of his lien.

THIS action of trover for tobacco having gone to a second trial, in consequence of the opinion of the Court delivered in *Trinity* term last, 6 East, 538, when it was considered that the defendant's taking an assignment of the tobacco in the King's warehouse by way of pledge from one *Coddan*, a broker, who had purchased it there in his own name for his principal, the plaintiff, (after which assignment the tobacco stood in the defendant's name in the warehouse, and could only be taken out by his authority,) and the defendants refusing to deliver it to the plaintiff after notice and demand by him, amounted to a conversion. The defence set up at the second trial was, that the plaintiff being indebted to *Coddan* his broker in 30*l.* on the balance of his account; and he having a lien upon the tobacco to that amount while it continued in his name and possession, the defendant who claimed by assignment from *Coddan* for a valuable consideration stood in his place, and was entitled to retain the tobacco for that sum; and therefore that the plaintiff not having tendered the 30*l.* ought to be nonsuited. Lord *Ellenborough*, C. J. however, being of opinion that the lien was personal, and could not be transferred by the *tortious* act of the broker pledging his goods of his principal, the plaintiff recovered a verdict for the value of the tobacco.

The *Solicitor-General* now moved to set aside the verdict, and either to enter a nonsuit or have a new trial; upon the ground that the defendant, who stood in the place of *Coddan*, and was entitled to avail himself of all the rights which *Coddan* had against his principal, could not have the goods taken out of his hands by the principal without receiving the amount of *Coddan's* claim upon them. And in answer to the case of *Daubigny v. Duval*, 5 Term Rep. 604, (which was suggested as establishing a contrary doctrine) he observed that Lord *Kenyon* was of opinion at the trial, that the principal could not recover his goods from the pawnee, to whom they had been pledged by the factor, without tendering to the pawnee the sum advanced by him, which was within the amount of the factor's lien upon the goods for his general balance; and that his lordship seemed to retain that opinion when the case was moved in Court, though the rest of the Bench differed from him. But

Lord *ELLENBOROUGH*, C. J. said, that nothing could be clearer than that liens were personal, and could not be transferred to third persons by any *tortious* pledge of the principal's goods. That whether or not a lien might follow goods in the hands of a third person to whom it was delivered over by the party having the lien, purporting to transfer his right of lien to the other, as his servant, and in his name, and as a continuance in effect of his own possession: yet it was quite clear that a lien could not be transferred by the *tortious*

act of a broker *pledging* the goods of his principal, which he had no authority to do. That in *Daubigny v. Duval*, though Lord *Kenyon* was at first of opinion that there ought to have been a tender to the pawnee of the sum for which the goods had been pledged by the factor, within the extent of his lien, in order to entitle the plaintiff to recover; yet after the rest of the Court had expressed a different opinion, on which he at that time only stated his doubts, he appears in the subsequent case of *Sweet and another, Assignees of Gard, v. Pym*, 1 East, 4, to have fully acceded to their opinion; for he there states that "the right of lien has never been carried further than while the goods continue in the possession of the party claiming it." And afterwards he says, "In the case of *Kinlock v. Kraig*, 3 Term Rep. 119, afterwards in Dom. Proc. ib. 786, where I had the misfortune to differ from my brethren, it was strongly insisted that the right of lien extended beyond the time of actual possession: but the contrary was ruled by this court, and afterwards in the House of Lords."

His Lordship then, after consulting with the other Judges, declared that the rest of the Court coincided with him in opinion, that no lien was transferred by the pledge of the broker in this case: and added, that he would have it fully understood that his observations were applied to a *tortious* transfer of the goods of the principal by the broker undertaking to *pledge* them as *his own*; and not to the case of one who intending to give a security to another to the extent of his lien, delivers over the actual possession of goods, on which he has the lien, to that other, with notice of his lien, and appoints that other as his servant to keep possession of the goods for him; in which case he might preserve the lien. (1)

Per Curiam,

Rule refused.

Doe, on the Demise of Levison Vernon, v. Henry Vernon and Others.

7 East, 8. Nov. 11, 1805.

The devisee of a copyhold or customary estate which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender: but the legal title remains in the heir of the surrenderor. Though if the first devisee had been considered to be admitted in construction of law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so,) or if the admittance of the first devisee's heir could be considered as an admittance by relation back of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide.

IN ejectment for certain customary tenements in the parish of *Wakefield* and county of *York*, tried in the spring of 1805, before *Graham, B.*, a verdict was taken for the plaintiff, subject to the opinion of the Court on the following case.

Thomas Earl of Strafford, being seised to him and his heirs, according to the custom of the manor, of (amongst others) the tenements mentioned in the declaration, which are customary tenements holden of the manor of *Wakefield* by copy of court roll, by rents and services, according to the custom of the manor, and pass by surrender and admittance, paying on admittance thereto; some of them compounded, or with certain fines, and others of them uncompounded, or with arbitrary fines to the lord; on the 10th of April

(1) Vide *Urquhart v. McIvor & al.* 4 Johns. 103.

1732, according to the custom of the manor, made the following surrender of his customary tenements to the use of his will: "*Wakefield, &c.* At this court it was witnessed upon the oaths of *B. S.*, a tenant of the lord that the Right Hon. *Thomas Earl of Strafford*, the 10th of April 1732, did surrender into the hands of the lord of the said manor by his hands all and singular the messuages, &c. lands, tenements, and hereditaments whatsoever, with their appurtenances, situate in *Wakefield, Stanley, Alverthorpe, Thornes, and Sandal Magna*, or elsewhere within the said manor of *Wakefield*, which the said Earl now holds of the lord of the said manor of *Wakefield* by copy of court roll, in whose tenures or occupations soever the same now are; being of the yearly rent to the lord in the whole of 4*l.* 10*s.* 8 1-2*d.*, and compounded for(a): to and for such uses, &c. and upon such trust, &c. and under such powers and authorities, as are or shall be declared by the last will in writing of him the said Earl, and to and for none other use, intent, or purpose whatsoever." The whole of the lord's rents paid for the customary tenements of the Earl holden of the manor amounted at the time of the said surrender to 4*l.* 18*s.* 1 1-2*d.*; part thereof, to wit, 2*l.* 11*s.* 5*d.* being for the compounded, and 2*l.* 6*s.* 8 1-2*d.*, the residue thereof, being for the uncompounded part of the customary tenements. The Earl, on the 22d of June 1732, by his will of that date duly executed, after specifically devising several estates to be held in tail, made the following general residuary devise of his other estates, including the said customary tenements holden of the manor of *Wakefield* which he had so surrendered to the use of his will: "And as to all other my manors, messuages, lands, tenements and hereditaments, whatsoever and wheresoever, either *freehold or copyhold*, (except those in the said counties of *York, Lincoln, and Nottingham*, which I have already disposed of by my will as aforesaid,) subject to the said several rents-charges of 2000*l.* and 200*l.* per annum, and such devises thereof as aforesaid, and the legacies by this my will, or by any codicil which I shall hereafter make, I give and bequeath the same, in *failure of issue male of the body of my said son William Lord Wentworth, and of my own body*, to my said three daughters, *Lady Ann, Lady Lucy, and Lady Harriet*, and their heirs, equally to be divided between them, as tenants in common, and not as joint tenants." The said testator died in Nov. 1739, without altering or revoking his said will, and leaving his only son, the said *William Earl of Strafford*, and his said three daughters him surviving. *William Earl of Strafford*, on the death of his father, *Earl Thomas*, entered into the said customary tenements, and enjoyed the same till his death, without issue, in 1791; but was never admitted thereto. *Lady Harriet Vernon*, one of the said daughters of *Earl Thomas*, on the 20th of April 1779, and whilst she was a widow, by her will of that date duly executed devised as follows: "Whereas under or by virtue of the last will and testament of my late father the *Earl of Strafford* deceased, I am or shall be entitled, upon the contingencies therein mentioned, to the *fee simple* of and in one undivided third, or some other part or share of divers manors, messuages, lands, tenements, and hereditaments in the several counties of *York, Lincoln, Nottingham, Northampton, Bedford, Suffolk, and Middlesex*, or elsewhere; now I do hereby give and devise all my estate, right, title, share, and interest of, in, and to the said several manors, messuages, lands, &c., of what nature or kind soever, and wheresoever situate or being, unto and to the use of my son *Levison Vernon*, his heirs and assigns forever: but subject nevertheless, and I do hereby charge the same estates with the payment of 2500*l.* from and immediately after my said son *Levison Vernon*, his heirs or assigns, shall come into possession thereof: such sum of 2500*l.* to be paid as therein directed."

(a) Vide *Roe d. Conolly v. Vernon*, 5 East, 51.

(a) Vide *Ras d. Sonelly v. Oernon*, 5 East, 51.

And after bequeathing several specific legacies, she devised as follows: "And all the rest, residue, and remainder of my estates, real and personal, of what nature or kind soever, goods, chattels, and effects, I give, devise, and bequeath to my son *Levison Vernon*, his heirs, executors, and administrators." Lady *Harriet* afterwards, on the 15th of *July*, by her codicil of that date duly executed, devised as follows: "whereas since the making of the foregoing will I am become seised of or entitled to sundry manors, messuages, lands, tenements, and hereditaments in the counties of *Northampton* and *Bucks*, devised to me by *Elizabeth Tordiffe*, widow, lately deceased; I do hereby give and devise all and singular the said estates, and all my right, title, and interest therein and thereunto, unto and to the use of my son *Levison Vernon*, his heirs and assigns for ever; charged and chargeable nevertheless with the payment of several annuities as therein mentioned. And I do hereby confirm my foregoing will in all respects, and declare this to be a "codicil thereto." Lady *Harriet* never surrendered the said customary tenements to the use of her will; nor was she or any other person (except as after mentioned) ever admitted to the same subsequent to the death of Earl *Thomas*. Lady *Harriet* died in 1786, without altering or revoking her said will or codicil, leaving two sons her surviving, viz. *Henry Vernon* the defendant, her eldest son, and *Levison Vernon*, the lessor of the plaintiff and devisee named in her will, her youngest son. On the death of *William* Earl of *Strafford*, son of Earl *Thomas*, considerable freehold estates in the counties of *Northampton*, *Suffolk*, *Middlesex*, and *Kent*, came into the possession of the descendants of the aforesaid three daughters of Earl *Thomas*, on failure of his and his son's issue male, by virtue of the aforesaid residuary devise in his will. And the lessor of the plaintiff, *Levison Vernon*, by virtue of the will of his mother, Lady *Harriet*, became entitled to one third part thereof, and has ever since enjoyed the same; but Lady *Harriet* was not at the time of making her will, or at the time of her death, seised of or entitled under or by virtue of the will of her father, *Thomas* Earl of *Strafford*, to any devisable estate or interest of or in any freehold premises, or any other premises, in the county of *York*, other than such estate or interest as she was entitled to (if any) in the aforesaid customary tenements under and by virtue of the aforesaid residuary devise of *Thomas* Earl of *Strafford*. The defendant *Henry Vernon*, son of Lady *Harriet*, is customary heir of the tenements in question, which are in the nature of compounded and uncompounded customary tenements, and part of the said customary tenements holden as aforesaid of the manor of *Wakefield*, whereof Earl *Thomas* was seised as aforesaid at the time of making the said surrender and at his death. It has been usual within the said manor for persons entitled to reversionary interests in customary lands holden of the manor, and desirous to dispose thereof by will or in mortgage or otherwise, to be admitted to such reversionary interests; and upon such admittances to estates not in possession, for the steward to assess an half fine; and such persons when so admitted have surrendered the same to the uses of their wills; and upon the inrollments of such surrenders for no fine to be paid: and no instance has been found of any admittance of persons claiming under wills, without a previous surrender to the use of such wills. The lessor of the plaintiff has been admitted to the tenements in question, and so has the defendant *Henry Vernon*, who is in possession thereof as landlord; and the other defendants are his tenants. The question was, whether the lessor of the plaintiff were entitled to recover all, or any part, and which, of such customary tenements? And it was agreed that this special case should be turned into a special verdict at the request of either party, or of the Court.

The case appearing to the Court upon the first argument to have been defectively stated, the following facts were afterwards added.

A sum of 4*l.* 14*s.* 6*d.* was annually paid by *William* Earl of *Strafford*, as customary or lord's rent, for these customary lands holden of the manor of

Wakefeld, from the death of his father, Earl *Thomas*, until the same was discontinued as hereinafter mentioned. The amount of such rents in the lord's books is 4*l*. 18*s*. 1 *l* 2*d*., but Earl *William* never paid more than the above sum of 4*l*. 14*s*. 6*d*. The receipts of the customary or lord's rents are entered in a book distinct from the court rolls, and never appear upon the rolls. Earl *William* does not appear by the court rolls to have been ever admitted, but was frequently applied to by the lord and by his steward to come in and be admitted, which he did not do; but in the year 1779 the lord insisting upon the said Earl *William*'s coming in to be admitted, and to pay his fines, the payment of the above sum of 4*l*. 14*s*. 6*d*. was discontinued; and in 1791 the lord filed his bill in Chancery against *Frederick Thomas* Earl of *Strafford*, to whom the estate had then descended, and the customary heirs of *William* Earl of *Strafford*, to compel the party entitled to the lands to come in and be admitted thereto, and that the lord's fine should be paid; which suit is still depending. The surrender of Earl *Thomas* to the uses of his will was presented in court in 1741, after his death, according to the custom of the manor; but his will was never enrolled until the year 1802, when Mr. *Conolly* was admitted tenant to the compounded part of the customary tenements under a writ of mandamus.

T. Carr in the last term(a) premised his argument by stating the principal facts to be shortly these; that Earl *Thomas* having surrendered the premises of which he was seised to him and his heirs, to the use of his will, died in 1739, leaving his only son Earl *William*, and three daughters, of whom Lady *Harriet Vernon* was one, after having demised the premises on failure of issue male of himself and his son to his three daughters and their heirs. That Lady *Harriet* made her will in 1779, and died in 1786; and that Earl *William*, her brother, survived her, and died without issue in 1791, never having been admitted. He then contended, that the customary estates in question passed to the lessor of the plaintiff, the younger son and devisee under the will of Lady *Harriet*, upon the following grounds: 1st, That the legal estate in a customary or copyhold tenement surrendered to the use of a will remains in the surrenderor, and on his death descends to his heir, until an admittance of some person having relation to that surrender. For which he cited *Doe d. Shewen v. Wroot*, 5 East, 132, and Co. Cop. s. 39, there cited as in point. 2dly, That the interest taken by the party named as devisee in the will made upon such surrender is until admittance an equitable interest only; and that such was the interest which Lady *Harriet* had as devisee in remainder under the surrender to the use of Earl *Thomas*'s will; Earl *William* never having been admitted; which, if he had been admitted under the will, as devisee, and not as heir, might have been contended to be an admittance of those in remainder, upon the supposition that he was the first taker. This, he said, followed as a consequence from the first proposition, and was further established by the case of *Roe d. Jeffereys v. Hicks*, 2 Wils. 13—16; where one had surrendered a copyhold to the use of his will, and devised the same; and the devisee before admittance was convicted of felony and executed; and it was holden that the lands descended to the heir of the surrenderor; the devisee having before admittance no interest in them as tenant which she could forfeit to the lord. 3dly, That Lady *Harriet* might devise such her equitable interest to the lessor of the plaintiff, without any surrender of it to the use of her will; according to *Davy v. Beardsham*, 1 Chan. Cas. 39. 3 Chan. Rep. 4, and 2 Freem. 157. *King v. King*, 3 P. Wms. 358, and *Greenhill v. Greenhill*(b). [*Le Blanc, J.* said, that it was too plain a proposition to be denied that an equitable interest in a copyhold would pass by devise, without a surrender to the use of the

(a) This was before the additional facts above stated were made part of the case.

(b) 2 Vern. 679. Prec. in Chan. 320. Gilb. Eq. Cas. 77. And vide *Car v. Ellison*, 3 Atk. 75.

will.] Then 4thly, he contended that the lessor of the plaintiff, the devisee of such equitable interest, having been admitted, such his admission had relation to the surrender made by Earl *Thomas*, the first devisor, to the use of his will, and vested the legal interest in him, the lessor: allowing that an admittance without title would not give a title. As in *Holder d. Sulyard v. Preston*, 2 Wils. 400, where one surrendered to the use of his will, and by his will directed the copyhold to be sold by trustees, and the money to be applied to certain uses; it was holden that a purchaser was entitled to be admitted under a conveyance from the trustees, without any previous admission of the trustees or of the heir at law of the surrenderor. So the admittance of the heir of a surrenderee dying before admittance has relation to the surrender, so far even as to give the surrenderee's widow her free bench. *Vaughan d. Atkins v. Atkins*, 5 Burr. 2764, 2773, 2787, which contains the whole law on the subject. And in *Kenebel v. Scrafton(a)*, the copyhold having been surrendered to one *Atkins* by way of mortgage, who after devising to *S.* and others died without being admitted; and then the mortgagor having died, and the copyhold descending to his infant daughter and heir at law, the Master, to whom the matter was referred, certified to the Lord Chancellor that the legal estate remained in the mortgagor, but that the devisees of the mortgagee were entitled to be admitted: and his Lordship, in *March* 1805, directed the same accordingly. He then argued, 5thly, that the customary estates in question passed to the lessor of the plaintiff under the devise in *Lady Harriet's* will of "all her estate, right, title, share, and interest in the several manors, lands, tenements, &c., of what nature or kind soever," &c. "in the counties of *York*," &c. Besides which there is a general clause, giving him "all the rest, residue, and remainder of her estates real and personal, of what nature or kind soever." He said, that it had been a question in some cases whether *copyhold* would pass by general words; but that was where there had been no surrender to the use of the will, and the doubt was whether the Court of Chancery would supply one: but here no such surrender is wanted; and in *Car v. Ellison*, 3 Atk. 73, the words, "*all my real estate*," were deemed sufficient to pass an equitable interest in a copyhold.

Walton, for the defendant, after referring to the case of *Roe d. Conolly v. Vernon*, 5 East, 51, as having decided, that the *compounded* customary tenements only were surrendered to the use of Earl *Thomas's* will, observed generally upon the two first points made in argument for the plaintiff, that the legal interest in a copyhold can pass no otherwise than *by surrender*; and a will only operates as a declaration of the use created by the surrender, and not as a devise of the land itself; and therefore it is that, according to *Tufnell v. Page*, 2 Atk. 37, neither the statutes of wills, 32 H. S. c. 1. and 34 & 35 H. 8. c. 5, affect copyholds, nor the statute of frauds, 29 Car. 2. c. 3, so far as the attestation of three witnesses to a will of land is required; though as a declaration of a use it is thereby required to be in writing. As there must be a surrender, so there must be an admittance in pursuance of such surrender; for before admittance a surrenderee has no interest in the copyhold: if he enter he is a trespasser, and if he surrender to another it is merely void. Co. Copyh. s. 39, and Supplement, s. 4. So if he commit waste, or felony, it is no forfeiture, because not being legal tenant he has nothing to forfeit. On that ground the case of *Miss Jeffereys*, 2 Wils. 13—16, was decided: the Court said, that as devisee of a copyhold surrendered to the use of a will she had before admittance neither *jus in re* nor *ad rem*; which as understood in the civil law, from whence the expression is borrowed, means that the party has neither a right of possession nor a right of action. Lord *Coke* in his *Copyholder* likens a surrenderee before admittance to a feoffee without live-

(a) This was quoted from MS. The same case, upon other points, is reported in 5 Ves. jun. 663. 8 Ves. jun. 30, and 2 East, 530.

ry: the investiture is not complete: the legal title remains in the feoffor in the one case, and in the surrenderor in the other, and upon the death of either it descends to his heir. 3dly, Admitting that according to decided cases an equity in a copyhold may be devised without a surrender to the use of the will, yet this court cannot take notice of the devise of an equity; they can only look to the legal title. And though the Court of Chancery will in general consider the heir at law as a trustee for the devisee of an equitable interest in a copyhold, where the intent of the testator to pass it is plain; yet that does not hold universally; for relief was denied in the case cited of *Davy v. Beardsham*, 1 Chm. Cas. 30. (3 Chan. Rep. 4, and 2 Freem. 157; and whenever it is given, that court may do it upon equitable terms: but this is an attempt to accomplish at once what the Lord Chancellor might refuse altogether, or only give effect to under circumstances. And this is a dispute between the heir at law having the legal estate, and the devisee a younger brother, who is otherwise well provided for, a circumstance to which the Lord Chancellor would advert(a). 4thly, As to the admission of Lady *Harriet*'s devisee having relation to the surrender to the use of Earl *Thomas*'s will, the whole doctrine upon this subject was much considered in *Vaughan v. Atkins*, 5 Burr. 2764. 2785, and there it was holden, that if the admittance were *pursuant to the surrender*, it would relate back to it, and altogether make but one conveyance: and therefore by the admittance of the heir of the surrenderee, his widow became entitled to her free bench; the legal estate thereby vesting by relation in the surrenderee himself, as if he had been admitted in his lifetime: as on the other hand in *Benson v. Scot*, 3 Lev. 385, and 1 Salk. 185, where the surrenderee was not admitted till after the death of the surrenderor, yet by the relation of such admittance to the surrender, the estate was considered as out of the surrenderor before his death, so as to oust his widow of her free bench, and to avoid all mesne acts of the surrenderor. Then if the admittance of the defendant, the heir at law of Lady *Harriet*, be the same by relation as the admittance of Lady *Harriet* the devisee herself, (and as a remainder or reversion may be surrendered; so one having such an interest may be admitted) then her devise of the customary tenements in question would be void for want of a surrender to the use of her will. And the same objection would apply if the payment of the customary rent by Earl *William*(b) could, under the circumstances stated, be considered as an admittance of him as first taker under the will of Earl *Thomas*, and so an admittance of those in remainder: though another question might arise, whether the remainder to the daughters in the will of Earl *Thomas*, after an indefinite failure, of issue male of his son Earl *William*, were too remote. But if the doctrine be clear as laid down in *Vaughan v. Atkins*, 5 Burr. 2764. 2785, and in Co. Copyh. s. 41, that the title to estates of this nature passes only by the surrender, and that an admittance in itself confers no title, except as it has relation to the surrender, it follows that the lord's act in admitting the lessor of the plaintiff is void; for he is not the heir of Lady *Harriet*; and the will of Earl *Thomas* having declared the uses of his surrender to be to Lady *Harriet* and her sisters and their heirs, none other than one who claimed as heir to one of them could be admitted. There is not even the word *assigns* in the will of Earl *Thomas* which might apply to an alienee, such as the lessor of the plaintiff is; though even that would not have done when coupled with the word *heirs*. It will be in vain hereafter to refer to the rolls of the court, to ascertain in whom the title is, if a will, and that too without a surrender to the use of it, may pass the title out of court. And if equity will take notice of an alienation by will; why should

(a) Vide *Ross v. Ross*, 1 Eq. Cas. Abr. 124.

(b) This fact was stated to exist on the first argument, though it was not regularly added to the case till afterwards.

it not equally notice an alienation by deed? As to the 5th point, he denied that the customary estates in question passed to the lessor of the plaintiff by the will of Lady *Harriet*. The general rule is, that neither copyholds nor leaseholds pass by the general words of a will, unless the copyholds have been surrendered to the use of the will, which was not done here; or unless there are particular circumstances to show an intent to pass them. And in Chancery, where the question most frequently occurs as to copyhold, the Lord Chancellor will not supply a surrender without an apparent intent of the deviser to pass copyhold. *Ross v. Ross*, 1 Eq. Cas. Abr. 124, *Bullock v. Bullock*, 2 Eq. Cas. Abr. 231, and 5 Vin. Abr. 58, pl. 19, *Challis v. Casborn*, Prec. in Chan. 408, *Byas v. Byas*, 2 Ves. 164, *Hawkins v. Leigh*, 1 Atk. 387, *Milbourn v. Milbourn*, 2 Bro. Ch. Rep. 64, and *Lindopp v. Eborall*, 3 Bro. Ch. Rep. 188, shew that the only exceptions to the general rule are either where the deviser had no other than copyhold lands, or where the devise is in favour of a wife, child, or creditors, not otherwise or inadequately provided for; and not even in favour of a wife or younger children, as against the heir left unprovided for. It is true that Lady *Harriet* had no freehold in *Yorkshire*, which is named amongst other counties, but she had in other counties named: and the mention of *Yorkshire* is not conclusive that she intended to pass her customary estates there; for she also names *Lincolnshire* and *Nottinghamshire*, in which she had nothing. It is plain therefore that she had no particular estates in contemplation, and she prefaces the whole list of counties with reciting that she was entitled under the will of her father to the fee simple of one undivided third part of lands, &c. in the several counties named; which shews that, if any, her freehold lands only were particularly in her contemplation. A similar rule has been applied to leaseholds in *Rose v. Bartlett(a)*, confirmed by *Thompson v. Lawley*, 2 Bos. & Pull. 312, and particularly in *Davis v. Gibbs*, 3 P. Wms. 26.

Lord ELLENBOROUGH, C. J. on the first argument desired that the case might either be amended, or go down to another trial, in order to have the fact more regularly brought before them, which had been suggested, namely, that for many years Earl *William* had paid rent to the lord which had been accepted, which would afford ground to presume an admittance of him as tenant. And then it might be argued, that the admittance of the particular tenant was the admittance of those in remainder. Though he suggested that the difficulty would still occur to the lessor of the plaintiff in either way of considering the case; for if there were no admittance of Lady *Harriet*, her devisee could not claim to be admitted under the surrender to the use of Earl *Thomas's* will; and if she were admitted, then she could not devise without having surrendered to the use of her will.

In this term, *Watkins* argued for the plaintiff, and began by stating two questions; 1st, Whether Lady *Harriet Vernon* was possessed of such an interest in the customary estates as she could devise, without a surrender to the use of her will? 2dly, Whether if she had such a deviseable interest, she had used proper words in her will to pass it? Upon the first point he was proceeding to shew that Lady *Harriet*, never having been admitted, had only an equitable title, which was consequently deviseable without a surrender to the use of her will, inasmuch as an equitable interest cannot be surrendered; and that on the death of Earl *Thomas* the legal estate descended to his customary heir Earl *William*, and so to the next heir, till the admittance of the lessor of the plaintiff, which entitles him to maintain this ejectment. And in addition to the authorities before cited on this point, he mentioned: 1 Roll. Abr. 502, pl. 3, 4. *Doe v. Miller*, 1 Term Rep. 395, *Berry v. Greene*, Cro. Eliz. 349,

(a) Cro. Car. 293. But where the leasehold had always been let with the freehold as one farm, it was holden to pass under general words. *Lane v. Ld. Stanhope*, 6 Term Rep. 345.

Peachy v. The duke of Somerset, Prec. in Chan. 573, *Semaine's case*, 1 Bulstr. 200, *Allen v. Poulton*, 1 Ves. 121, *Attorney-General v. Andrews*, 1 Ves. 225, and *Duke of Marlborough v. Lord Godolphin*, 2 Ves. 77. He also referred to *Hills v. Downton*(a), to shew that the Court would not look to the circumstance, whether the heir or the devisee were otherwise provided for by the will or not. It was then asked by

LORD ELLENBOROUGH, C. J., Have you any case to shew where this Court has taken notice of an equitable title in a copyhold? Does a court of law ever take notice of an equity? As a question of law there is really nothing for us to deliberate upon; and therefore we would willingly relieve you from further trouble. Lady *Harriet* never was in fact admitted, though if she had been admitted, yet according to the custom she could not have devised the premises without a surrender to the use of her will: so that there is neither an admittance of her, nor a surrender to the use of her will. Then are we to be hunting after an equity, when this Court has nothing to do but with the legal estate? For as to the admittance of the lessor of the plaintiff, that merely clothes him with a legal title to the possession, if he had before a title to the estate pursuant to the surrender; but it does no more; it will not give him a title. It is enough however to say, that Lady *Harriet* never was in fact admitted under the surrender by her father to the use of his will, and her devisee cannot be in a better situation than herself. It is impossible to sustain the argument for the lessor of the plaintiff in the total absence of any legal title: and we cannot determine who has the equity; he must go to the other side of the hall to learn that. But our opinion is, that even supposing him to have an equity, we cannot help him here.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J. How can the admittance of Lady *Harriet's* devisee be connected with the surrender to the use of Earl *Thomas's* will? How, upon inspection of the court rolls, can the devisee's title be made out? There would appear a surrender to the use of Earl *Thomas's* will, and an admittance of the devisee of another person, but the relation of the one to the other would not appear. It may indeed be considered in equity, that the heir at law of Earl *Thomas* is a trustee for the devisee of Lady *Harriet*: and equity may in that case oblige the heir to surrender to such devisee; and then the title will all appear regular; but in order to ascertain whether the devisee has an equity, he must apply to a court of equity.

LE BLANC, J. assented.

Postea to the defendant.

Sharp v. Gladstone.

7 East, 24. Nov. 15, 1805.

While a ship was forcibly detained in a foreign port, the owner abandoned first the *ship* and then the *freight*, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo which had been taken out, and returned home, *earning freight*, which was received by the assured. *Quære*, Whether the assured, after an abandonment of the *ship*, (which was a *seeking* and not a *chartered* ship; on which a distinction may arise;) could abandon the *freight* to another set of underwriters? But assuming that he might, the ship and freight are *salvage* to the different underwriters, after deducting the following expences, which must be apportioned between them according to their several interests: 1. The expences of ship and crew in the foreign port, including port charges, (besides the expence of shipping the cargo, which exclusively belongs to the underwriters on *freight*.) 2. Insurance thereon. 3. Wages and provisions of crew from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign Government) to the crew during their detention. But the assured was not entitled to de-

(a) 5 Ves. jun. 557. Vide Mr. Coz's note to *Watts v. Bullas*, 1 P. Wms. 60, 5th edit. where the principal cases on the subject are collected.

duct out of the freight received payable to the underwriter on freight; 1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home.

THE plaintiff declared in *assumpsit* for money had and received, and upon the usual money counts. Plea, the general issue. At the trial at the sittings at *Guildhall*, after last *Hilary* term, before Lord *Ellenborough*, C. J. a verdict was found for the plaintiff for 100*l.* and also 16*l.* for interest from the 24th of *February* 1802 to the 8th of *May* 1805, subject to the opinion of the Court on the following case. The defendant, as owner of the ship *Jane*, caused a policy to be effected thereon for a voyage from *Liverpool* to *Petersburgh* and back. He also caused another policy to be effected for 800*l.* on the freight from *Petersburgh* to *Liverpool*, as interest should appear; to which last policy the plaintiff was a subscriber for 100*l.* On the 5th of *November* 1800, the ship, being at *Cronstadt* upon the voyage insured, and being a *seeking* and not a *chartered* ship, had taken on board a considerable part of her homeward cargo on freight, and the remainder was then loaded in lighters in its passage from *Petersburgh* to *Cronstadt*. The master had signed bills of lading for the cargo, which was shipped by different merchants, each upon a distinct engagement for freight. The ship would have been ready to sail in six or seven days on her voyage home: when, on the said 5th of *November* 1800, by order of the *Russian* Government, the ship was forcibly seized, the master and crew were compelled to quit her, and were marched into the interior of the country, and the cargo was relanded by the *Russians* and put into warehouses. The ship, crew, and cargo, remained in possession of the *Russians* until the 22d of *May* 1801, when the master and crew were liberated, and allowed to take possession of the ship again. The master, upon his liberation, procured the greater part, but not the whole of the original cargo to be reshipped, for which he signed new bills of lading; and the remaining part of his lading consisted of goods which were no part of the original cargo. The ship continued at *Cronstadt* for the purpose of procuring and completing her freight on the voyage home, from the 22d of *May* to the 3d of *July* 1801, when she sailed, and arrived at *Liverpool* in *August*. The defendant has received the freight earned by the ship on her voyage home, the proceeds of which amount to about 1900*l.* In *February* 1801, the defendant abandoned the ship to the underwriters thereon, and abandoned the freight to the plaintiff, and the other underwriters on freight, as far as insured; and the defendant received from the plaintiff and the other underwriters on freight the full amount of their respective subscriptions as for a total loss. The defendant claims to have paid the following charges upon the ship and freight, a proportion of which he claims to deduct from the net proceeds of the freight received by him as aforesaid.

Expences of the ship and crew at <i>Petersburgh</i> and <i>Elsineur</i> ,	£	s.	d.
including port charges, and the expence of shipping the cargo			
upon which the freight has been paid	305	14	0
Insurance on the same	9	19	6
Wages of and provisions for the master, mate, and seamen, from the time they were liberated in <i>Russia</i> till discharged in <i>England</i> , being four months	223	6	11
Charges paid at <i>Liverpool</i> on ship and cargo	91	16	5
Insurance on ship home 3000 <i>l.</i> at 4 guineas less returns	90	2	0
Wages to the master and crew during their detention in <i>Russia</i> , being six months	270	0	0
The defendant also claims to be entitled to make the following charge against the freight;			
Diminution in the value of the ship and tackle, by wear and tear, on the voyage home, she being then employed for the benefit of those interested in the freight	£	s.	d.
	300	0	0

The question for the opinion of the Court was, Whether the defendant were entitled to deduct a proportionable part of any and which of the said charges from the amount of the freight received? If the Court should be of opinion that he was not entitled to any deduction in respect thereof, then the verdict to stand. But if the Court should be of opinion that he was entitled to such deduction, then it was agreed between the parties that the amount of the particular charge or charges, in respect of which the Court should think a deduction ought to be made, together with the amount of such deduction, should be referred to arbitration: and the amount which the arbitrator should find should be deducted from the verdict obtained, and a verdict to be entered accordingly.

This case was argued in *Trinity* term last, by *Rough* for the plaintiff, and *Scarlet* for the defendant; and again in this term, by *Park* for the plaintiff, and the *Solicitor General* contra.

The facts were shortly these: the defendant, owner of a seeking ship in the *Russian* trade, insured ship and freight with different sets of underwriters on a voyage home from *Petersburgh* to *Liverpool*; and after part of the lading taken on board and the rest ready to be shipped, the ship and cargo were seized by the *Russian* government, and the crew sent into confinement; on which the owner abandoned ship and freight to the respective underwriters, and received as for a total loss. And after some months elapsed the ship and crew were liberated and returned home with her cargo, and earned freight, which the owner received from the shippers of goods; and the principal question made was, whether in an action by an underwriter on freight to recover the freight so received by the owner, the latter were entitled to deduct certain expences incurred in prosecuting the adventure, and bringing home the ship and cargo, subsequent to such abandonment.

The plaintiff's counsel contended, that the underwriter on freight, to whom it has been abandoned, and who has paid as for a total loss, is in the same situation as a common assignee of the freight for a valuable consideration, without abandonment, at least as against the owner of the ship and freight in whom both interests were united, and also against the underwriter on ship after severance of the interest by the abandonment: as it is contrary to all experience that a ship owner should charge such an assignee with expences incurred by mariners' wages, provisions, or wear and tear of the ship, however increased by the protracted duration of the voyage from contrary winds, or detained by ships of war at sea: so neither can he be charged with such expences incurred by the forcible detention of the ship in a foreign port. For in estimating what the owner of the goods shall pay for freight, the ship owner takes into the account all the risks, delays, and expences of the voyage, and he receives a compensation adequate to the average amount of them in the freight: then when the underwriter to whom the freight is abandoned has paid as for a total loss, he has already paid his average proportion of such expences; and he only undertakes, that if the accidents of the voyage should prevent the earning of freight from the owner of the goods, he will replace the loss to the ship-owner. The underwriter on freight therefore is, in case of loss, in the place of the owner of goods to the ship-owner, and cannot be chargeable for more than the latter would be liable for in case of the arrival of the goods. The question then must be considered the same as if the goods having arrived safe, without an intervening abandonment, and full freight being paid by the owner of goods to the ship-owner, the latter had brought an action against the underwriter on freight to recover these expences. In *Leatham v. Terry*, 3 Bos. & Pull. 485, where the underwriters on freight recovered from the owner the amount of the freight which he had received after an abandonment of it to them; it was indeed intimated at the conclusion of the case that the underwriters were to contribute proportionably towards the expence of bringing home the cargo; but the point was not argued, nor any solemn decision given upon it. And in

Thompson v. Rowcroft, 4 East, 52, it was considered, that after an abandonment to the respective underwriters on ship and freight, the owner or underwriters on ship, and not the underwriters on freight, at least as between them and the owner, who stood in the situation of a wrongdoer by the receipt and retention of the freight, were liable to these expences. [Lord *Ellenborough*, C. J. observed, that this point was not argued in that case, but was merely thrown out at the conclusion of it.] It was there said however, that expences of this sort were not, properly speaking, salvage on the freight, but charges paid by the owner of the ship for the benefit of those to whom he abandoned it, a proportionable part of which he would be entitled to retain on his settlement with them.

At the conclusion of the first, and in the course of the second argument, Lord *Ellenborough*, C. J. observed, that he felt great difficulty in saying that after an abandonment of the ship by the owner to the underwriters on ship, he could abandon the freight, which seemed to follow the property in the ship, being the earnings made by the subsequent use of that which was then become the property of others, to another set of underwriters: and if he could not, then it might be considered, that having nothing of his own to abandon to the underwriters on freight, it was the same as if there had been no abandonment; in which case the plaintiff could not recover the freight from the owner. That if this had been a *chartered* ship he should have known better how to deal with the difficulty: but in the case of a *seeking* ship, as this was, he did not well know how to separate the character of owner of the ship from that of owner of the *freight*, where the freight was to be earned on each parcel of the goods shipped and brought home.

LAWRENCE, J., who seemed to incline to the same opinion, said, (in answer to a suggestion by the plaintiff's counsel that it did not lie in the defendant's mouth to make the objection after having severed his interest, and abandoned the freight to the underwriters thereon; after which his receipt of the freight must be taken to have been in the character of their agent;) that the defendant might be considered as the agent of both sets of underwriters, and therefore entitled to retain whatever he was liable to pay over to the underwriters on ship. But

LE BLANC, J. observing that the only questions raised for the consideration of the Court by the case reserved were, whether the defendant were entitled to make any and what *deductions* out of the freight; assuming that he was liable in the first instance to pay the freight over to the plaintiff; and it being confirmed by the counsel at the bar that no question as to the right of abandonment to the underwriters on freight was made at the trial; all the Court agreed that the argument should proceed upon the several items of deduction insisted upon by the defendant, as stated in the case.

The plaintiff's counsel then proceeded to discuss the particular items. 1st, the expences of the ship and crew at *Petersburgh* and *Elsineur*, including port charges, and the expence of shipping the cargo. These must be taken to mean the ordinary expences which must accrue in every voyage; for the extraordinary expences arising from the hostile detention form another substantive charge. But if these could be charged on the underwriters on freight, there would be an average to be paid by them in every case, which has never been thought of before. These are expences necessarily incident to the ship-owner who charges freight in proportion. The only part of this item with which the plaintiff seems to have any concern, is the expence of *shipping the cargo*, on which the freight accrued. But as such a charge could not have been made on the owner of goods shipped, if there had been no abandonment, so it cannot be made on the underwriters on freight, who stand in his place, as against the owner of the ship; nor can the latter be put in a better situation by the abandonment than he was before. 2dly, The insurance on the expences abovementioned must be governed by the same rule.

3dly, The wages and provisions of the master and crew in the voyage home must necessarily have been incurred, without any extraordinary peril or loss for which the underwriter on freight would have been liable, and cannot be charged on him, having been once before paid for in the price of the freight. Neither, 4thly, can he be accountable for the charges at *Liverpool* on ship and cargo, which must have been paid when he was off the policy, and after the freight had been earned: but such charges must either affect the owner of the ship or of the goods. 5thly, There is as little pretence for charging the underwriter on freight with the insurance home on the body of the ship itself, which from the very nature of the contract must belong to the underwriters on ship. The like observation will apply to the 7th item, the diminution in value of the ship and tackle by wear and tear on the voyage home. For the plaintiff had no interest in the body of the ship, and if the voyage had been ever so short and prosperous, some wear and tear must have occurred; with the degree of it the underwriter on freight has no concern; for whether it be more or less, provided the goods arrive safe, the freight is equally earned: and though the ship had sunk immediately after the goods were delivered, he would not have been liable to contribute to the loss. The principal item is the 6th, viz. the wages(a) of the master and crew during their forcible detention in *Russia*; which must be admitted to be an extraordinary expence occasioned by a peril insured against: and the question is, whether after abandonment it is to fall on the underwriters on ship, or on freight, or on both proportionably, or on neither of them. But if it were not to be borne altogether by the owner of ship, they contended that it would be *general average*, being incurred for the benefit of the whole adventure. The case of *Robertson v. Ever*, 1 Term Rep. 127, only decided that wages and provisions during a detention were not a charge upon the underwriters on ship; but not that they were to be borne by the underwriters on freight. [*Le Blanc*, J. observed, that there was no abandonment in that case.] It was not determined on whom the loss should fall in case of an abandonment, and it was not said that the owner himself should not bear it. In another case, indeed, of *Eden v. Poole*(b), Mr. Justice Buller said, that the underwriters on freight, and not those on ship, were liable to those charges; but as to the freight, that was merely a *dictum*, and not a point necessary to be decided: as that was an action against the underwriter on ship; and in subsequent cases it has been considered not as a charge on freight alone, but as *general average*: which is the opinion of general writers, Beaves Lex Merc. 160, and 1 Magens, 67, and agrees with the ordinance of Lewis XIV. tit. Average, art. 7. And such seems to have been the opinion of Lord Mansfield in *Latward v. Curling*(c), and in *Da Costa v. Newham*, 2 Term Rep. 407, where a ship had put into port in the course of her voyage, for the benefit of all concerned, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs wanted, were deemed to be general average.

(a) Wages were considered to be payable to the master and crew in *Beale v. Thompson*, 4 East, 546.

(b) Sittings after Hil. term, 1785 at *Guildhall*. The *dictum* here referred to is to be found in a note of that case in *Park on Insurance*, ch. 2., where it is said to have been contended on the part of the insurer on ship, "and so held by Mr. Justice Buller, that the freight and not the ship, was liable for this loss;" i. e. the expences of wages, provisions, &c. during detention by a governor in a foreign port. A note of the same case is given at the end of the report of *Robertson v. Ever*, 1 Term Rep. 132, in which it is only stated, that Mr. Justice Buller was of opinion that these charges were not allowable on such a policy. And on referring to my own MS. from whence the printed note was taken, I do not find any opinion of the learned Judge as to the exclusive liability of the freight for such charges, though that was contended for by Mr. Lee, who was counsel for the underwriters on ship; who said that it was so determined every day.

(c) *Guildhall*, sittings after Trin. 1776, *Park on Insur.* ch. 7. tit. General or Gross Average.

Lord ELLENBOROUGH, C. J. observed, that strictly speaking, the term *general average* was more usually taken to mean a sacrifice or loss of part of the adventure for the benefit of the whole; but that this was an additional expence incurred for the benefit of all. It was for the interest of all the parties that the ship's crew should be kept in a state to navigate her home with the cargo: and if for the benefit of all, was it not fair that the expence should be divided proportionably?

For the defendant it was argued, that as by our law freight was the subject of separate insurance, so abandonment and salvage were incident to it as to other subjects of insurance. If the ship and cargo be sunk for a time, or the voyage lost or interrupted, so as to afford no present prospect of saving the one or prosecuting the other with effect, the assured may abandon, and the underwriter is liable to pay as for a total loss: but in return for this he has the benefit of salvage; and in case of any loss, the assured by himself, his servants, &c. is bound by a stipulation in every policy "to sue, labour, and travail for" the recovery, &c. of the ship and goods; which is for the benefit of the underwriters. Whatever expence therefore is incurred in so doing is incurred by the assured in the character of agent for the underwriters; and whatever is saved is for their benefit who are entitled to salvage; but *salvage* is not, properly speaking, the thing saved, but the balance of its worth after deducting the expence of saving it. Though nothing were saved, the underwriters would still be liable for whatever expence was bona fide incurred in the attempt; the assured being bound to sue, labour and travail for them; and the assured would still be entitled to receive as for a total loss. Here the voyage was finally prosecuted with effect after the abandonment: the thing saved was freight; in doing which certain expences were incurred, without which no freight would have been saved: but as the underwriter can claim nothing but salvage, and *salvage is the thing saved after deducting the expences*, therefore the assured who derives no benefit to himself from the freight ought to be paid the expences incurred in saving it for the benefit of the underwriters on freight. The opinions thrown out in *Thompson v. Roscroft*, 4 East, 52, and *Leatham v. Terry*, 3 Bos. & Pull. 486, were without argument, and at the moment.

With respect to the particular items, it was observed, that part at least of the first, the expence of shipping the cargo, ought exclusively to be borne by the underwriters on freight, being altogether for their benefit; and that the other expences upon the ship and crew, and the port charges abroad, including the duties for passing the *Sound*, without which no freight could have been earned, ought also to be paid by those who alone profited by the home voyage, or at least they should bear a proportionable share; (which it was said might be settled by some person out of court cognizant of such matters.) That the 2d item, viz. the insurance on the above, would follow the same rule. [Lord *Ellenborough* observed on the first argument, that the charge of duties on the ship could not form an article of *general average*, as they would have been payable at all events whether the ship had returned home early or late.] 3dly, as to seamen's wages and provisions from the liberation of the ship in *Russia* till her discharge at *Liverpool*; those, it was said, would come under *general average*. [On which Lord *Ellenborough* observed, that that would only apply to such of those charges as were occasioned by the detention; which must be first ascertained.] Part at least, it was answered, was incurred by the delay of re-shipping the cargo. [It was here suggested on the first argument by the defendant's counsel, that the better way would be for the court to decide whether the particular items formed *general average* or salvage: and that then the proportions should be left to arbitration: which seemed to be assented to.] 4thly and 5thly, The charges paid at *Liverpool* and the insurance on the body of the ship were not insisted upon. The 7th item as to the wear and tear of the ship, it was said, ought to be apportioned, if, as was contended,

the ship was then employed in earning freight for the benefit of the underwriters on freight, and not of the other underwriters who by the abandonment were the then owners of the ship. As to the 6th and principal item, the wages of the master and crew during the retention, they relied on the cases of *Robertson v. Ewer*, 1 Term Rep. 127, explained in *Brough v. Whitmore*, 4 Term Rep. 206, and the two *nisi prius* cases cited of *Fletcher v. Poole* and *Eden v. Poole*, particularly for the opinion of *Buller, J.* in the latter, as given in *Park on Insurance*, and again in *Da Costa v. Newnham*, 2 Term Rep. 414, to shew that provisions, not forming part of the original outfit of the ship, but expended during a detention of the ship in a foreign port, and wages accruing during such detention, were not to be paid for by the underwriters on ship, but out of the freight. And it was observed, that this was either to be considered as a total loss with benefit of salvage, or a partial loss with general average.

LORD ELLENBOROUGH, C. J. As no question arises now upon the effect of the abandonment of the freight to the underwriters on freight after an abandonment of the ship to the other set of underwriters; but the abandonment in this case is assumed to have been properly made, and to have conveyed a right to the freight to the plaintiff, subject to any and whatever deductions the assured may be entitled to make: and as it is agreed to consider each set of underwriters as in the place of the assured for the respective interests insured which have been abandoned to them; then the underwriters on freight to whom it has been abandoned, having paid as for a total loss, are entitled to the benefit of salvage, and the net salvage is that which remains of the subject matter after payment of the expences of saving it. After the abandonment the assured was to be considered as the agent of both sets of underwriters, and he laid out what was necessary for the benefit of the whole concern, without applying the several proportions to each at the time for their separate interests. But each set of underwriters is entitled to have their respective salvage, subject to the deductions applicable to each. With respect then to the particular items, the charges paid at *Liverpool* are to be struck out; and so is the insurance on the ship, which can be no charge upon the freight; and so must the last item, of diminution of the value of the body of the ship and tackle by wear and tear. The remaining items must be considered as so many deductions from the salvage, which must be apportioned according to the respective interests of the two sets of underwriters in the judgment of the persons to whom the same are agreed to be referred. The expence of putting the cargo on board was certainly altogether for the benefit of the underwriters on the freight; and the expences at *Petersburgh* and *Elsineur* must be apportioned. As to the general question, whether an abandonment could be made to the underwriters on freight after an abandonment to the underwriters on ship, I beg to be understood as giving no opinion; and with respect to that, this not being the case of a *chartered* but of a *seeking* ship, a distinction may arise.(1)

Per Curiam,

Postea to the Plaintiff, subject to the deductions to be made upon the items referred.(2)

(1) Vide *Morrison v. Parsons*, 2 Taunt. 407, 415. *Insurance Company of North America v. Jones & al.* 2 Binn. 547.

(2) [See n. 3. to *Thomson v. Rowcroft*, 4 East, 52.—W.]

Anderson, Bart. and Another v. The Royal Exchange Assurance Company.

7 East, 35. Nov. 19, 1805.

A vessel sailing with *corn* insured, from *Waterford* in *Ireland* to *Liverpool*, by a policy with a memorandum to be free from all but general average, was stranded near *Waterford* on the 28th of *Jan.*, and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried; but no notice of abandonment was given to the underwriters in *London*, till the 18th of *Feb.*, though there is a constant regular intercourse between *Waterford* and *Liverpool* where some of the assured lived; which was holden to be out of time. For whether or not upon such a policy, where there was an opportunity of sending on the corn which was saved to the place of destination within two months after the accident in another vessel, the assured were entitled to abandon as in case of a total loss; at all events they ought to have made their election to abandon within a *reasonable time*, (on which it seems that the Judge ought to instruct the jury under the circumstances of the case,) and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage.

THIS was an action upon a policy of insurance to recover a total loss on a cargo of wheat in the ship *Fanny*, on a voyage from *Waterford* to *Liverpool*; plea, the general issue. At the trial at the sittings after *Hilary* term 1805, before Lord *Ellenborough*, C. J. a verdict was found for the plaintiffs, damages 91*l.* 9*s.* 8*d.*, subject to the opinion of the Court on the following case.

The ship *Fanny* was loaded at *Waterford* in *January* 1804, with a certain quantity of wheat in bulk, equivalent in measure and quantity to 2406 barrels. The insurance was effected on account of *A. Comber of Liverpool*, merchant, upon 696 barrels of the said wheat, his property; and the same were shipped by *T. Nevins*, who acted as his agent at *Waterford*, and were of the value of 1000*l.* the sum insured. The policy contains the following stipulation, "Free from all average on *corn*, flour, fish, salt, fruit, seeds, hides, and tobacco, unless general or otherwise specially agreed." There was no special agreement in the policy, respecting the payment of an average loss on *corn*. The *Fanny* sailed from *Waterford* on the voyage insured on the 28th of *Jan.* 1804, with the wheat insured on board, and in proceeding down the river she struck upon a rock, which occasioned her immediately to fill with water, and, to prevent her from sinking, she was run on shore. The hull of the ship was for four weeks entirely under water at high water, and until the cargo was taken out she could not be raised or removed. The whole of the cargo was damaged. 1635 out of the said 2406 barrels of wheat were taken out of the ship, and afterwards kiln-dried at *Waterford*. The said 1635 barrels first began to be taken out on the 31st of *Jan.* 1804, and continued from time to time taking out until the vessel was raised. *A. Comber's* proportion of the 1635 barrels so taken out amounted to 473 barrels, which were delivered to *T. Nevins* as his agent. Some part of the remainder of the cargo of wheat was sold to feed hogs, and the residue thereof was thrown into the sea as unfit for use. The whole quantity kiln-dried, as before stated, except the 473 barrels belonging to *A. Comber*, was, two months after the accident happened, shipped on board another vessel for and arrived at *Liverpool*, and was received by underwriters on policies including losses by stranding, and the 473 barrels belonging to *A. Comber* might have been forwarded in like manner if he had given directions for that purpose. The 473 barrels were sold by *T. Nevins*, and produced 249*l.* 1*s.* 9*d.*; but the expence of saving and kiln-drying the same reduced the net proceeds thereof to 95*l.* 13*s.* 4*d.*, which sum has been remitted to and received by the plaintiffs. After the ship had remained four weeks

in the situation before described she was weighed up and taken back to *Waterford*, then incapable of prosecuting the voyage, and continued under repairs until the latter end of *April*, by which time she was repaired. On the 18th and 25th of *Feb.* 1804, the plaintiffs and also *A. Comber* gave notice of abandonment to the defendants; but the defendants refused to accept such abandonment. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover in this action as for a total loss, with benefit of salvage: and if not, then as for a total loss of that part of the goods in question which was not kiln-dried? If the Court should be of opinion that the plaintiffs were entitled to recover as for a total loss of the whole cargo, with benefit of salvage, then the verdict to stand: but if the Court should be of opinion that the plaintiffs were entitled to recover only as for a total loss of that part of the goods in question which were not kiln-dried, then a verdict to be entered for the plaintiffs for 356*l.* 16*s.* only. And in case the Court should be of opinion that the plaintiffs were not entitled to recover any part of the sum demanded, then, a verdict to be entered for the defendants.

J. Clarke for the plaintiffs contended, that this was a total loss, and consequently took the case out of the memorandum in the policy. The general principle is, that where in consequence of an accident to the ship the voyage is lost, though part of the goods be saved, yet if that part do not reach the port of its destination for the benefit of the owner, it is, as to him, a total loss. As in *Manning v. Newnham*,^(a) where the ship, freight, and goods having been warranted free of *particular* average, assimilates the case to this: the ship was obliged by stress of weather and distress to put back to *Tortola* three days after she sailed from thence on the voyage insured to *London*, but the cargo was not damaged, and sold there for within an 18th of its value: and though the greater part of it might have been sent home in two ships which happened to be at *Tortola*, and have sold at a great profit; yet the Court held, that as the voyage was totally lost the assured might abandon. This rule applies particularly to the case of a perishable cargo, where the loss of a voyage within a given time necessarily causes the loss of the cargo itself. It is otherwise where the corn itself arrives at its port of destination, however damaged; as in *Mason v. Skurray*;^(b) and that turned principally upon the evidence of usage in trade. The case of *Cocking v. Fraser*, *E.* 25 G. 3. B. R. Park, 114. 1st edit. 126; 1 Marshall, 144, is distinguishable from the present; for there the ship remained sound, and after throwing some of her cargo (fish) overboard for the preservation of the ship and cargo, was only prevented from continuing her voyage to the place of destination with the rest by the badness of it, which made it not worth while to proceed. It was therefore a *voluntary* renunciation of the voyage by the assured: and this was holden to be only a partial loss, for which the underwriter was not liable. That the loss of the voyage is considered as a total loss appears by several cases: *Goss v. Withers*, 2 Burr. 663, *Hamilton v. Mendez*, *ib.* 1209, and *M^r Andrews v. Vaughan*, Park, 115. Now here the voyage was totally lost to the assured: for the ship was sunk, and the corn never arrived at its place of destination; and therefore it was competent for him to abandon.

Lord ELLENBOROUGH, C. J. Is there any case where the loss of the voyage has been holden to be in itself a total loss; or is it not a cause of abandonment only: and then must not the assured abandon in due time, while for aught appears the loss continues a total one in that sense? As if in this case the assured had abandoned while the thing insured continued under water. Now here it was three weeks, or near a month, before the abandonment; and all the intermediate time the assured took to the ship and cargo, and worked

(a) Tr. 22 Geo. 3. 2 Marshall, 505, and Park, 169, S. C. It does not appear when the abandonment was in this case.

(b) *Guildhall*, sittings after *Easter* 1780, Park, 116, 1st edit. 131, and 1 Marshall, 143.

at is as upon their own account; and did not elect to abandon till a considerable part of the cargo was taken out. It has been determined in a variety of cases that a party must abandon within a reasonable time, otherwise he waives his right: there lies the difficulty; for there is a constant intercourse between *Waterford* and *Liverpool*, and the assured must have known of the loss long before the 25th, or even the 18th of *February*. It may however be material to know when they had the first notice of it.

It was then suggested by the plaintiff's counsel, that in fact the offer to abandon was made before the 18th, and refused by the underwriters; after which a more formal notice was given on the 18th.

LORD ELLENBOROUGH, C. J. Let the case then stand over, and see if it can be amended by the addition of the fact suggested. We can only pronounce on the case presented to us, and on that case, as it appears to us at present, we are of opinion that the abandonment was out of time. It was not in fact, as it turned out, a total loss; but during the time it was submerged in the water it might have been treated as such: they did not however treat it as a total loss at that time, but continued labouring on the vessel and cargo on their own account for some time afterwards, from the 31st of *January* till the 18th of *February*, and had succeeded in preserving part of it, and did not elect to abandon till they found that it would not answer to keep to the cargo: and when they did abandon, it was no longer in fact a total loss. But an abandonment must be made within a reasonable time: and I rather conceive that it is the province of the Judge to direct the jury as to what is a reasonable time under the circumstances.

LE BLANC, J. The assured must not take the chance of endeavouring to make the best of the accident for himself, and when he finds that it does not answer, then to abandon to the underwriters.(1)

Per Curiam,

Let there be judgment *nisi* for the delivery of the *postea* to the defendant, unless in the course of the term any additional facts can be stated to alter the case.

Park, who was counsel for the defendants, observed, in the course of the argument for the plaintiffs, upon the case of *Manning v. Newnham*, that Lord *Mansfield* relied in his judgment on the circumstance, that the *whole* cargo could not be re-shipped and forwarded to the place of its destination, and that the assured was not bound to ship *part* only. And he also referred to *Alwood v. Henekell*, (a) where Lord *Kenyon* said, that "the assured must make his election speedily whether he will abandon or not. He cannot lie by, and treat the loss as an average loss, and take measures for the recovery of it, without communicating that fact to the underwriters, and letting them know that the property is abandoned to them."

On a subsequent day an affidavit was produced on the part of the plaintiffs, by which it appeared that the assured had received notice of the loss on the 2d of *February* by letter, which was immediately communicated to some of the members of the Company, with an offer to abandon, who declined to accept such abandonment, but referred the assured to their committee, who afterwards confirmed the refusal, contending that it was only a case of average loss: in consequence of which the formal notices stated in the case were sent. It was therefore proposed that the notice of abandonment should be stated as having been given on the 4th instead of the 18th and 25th: but this not being acceded to on the part of the defendants, the Court awarded a new trial.(2)

(1) Vide note (3) to *Barker v. Blakes*, 9 East, 294.

(a) *Sittings after Mich.* 1792, *Park*, 172.

(2) Abandonment must be made within a reasonable and convenient time after notice of the loss. What constitutes a *reasonable time*, is a question of fact, depending upon the various circumstances of the case. *Bell v. Beveridge*, 4 Del. 272. *Hurtin v. Phenix Ins. Co.*, 1 W. C. C. R. 400. *Krumhaar v. Marine Ins. Co.*, 1 S. & R. 261. *McCal-*

The King against the Inhabitants of Long Buckby.

7 East, 45. Nov. 20, 1805.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was *properly stamped* in proportion to the apprentice fee of 12*l.* received by the master; although the deputy register and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period; and the judgment of the justices was confirmed in *B. R.*

TWO justices by an order removed *William Lee*, *Sarah* his wife, and their children by name from the parish of *Long Buckby* in the county of *Northampton*, to the parish of *Newport Pagnell* in the county of *Bucks*. The Sessions on appeal quashed the order, subject to the opinion of this Court on the following case.

The pauper *William Lee* who was the illegitimate son of *Mary Lee* was born in the parish of *Newport Pagnell*, and in the year 1774 or 1775, was bound apprentice by indenture to *John Dickens* of *Long Buckby*, shoemaker, for seven years, for a premium of 12*l.*, which was paid, and the indenture regularly executed by the pauper, his mother, and *Dickens*, the master, with whom the pauper served his full time in *Long Buckby*. Only one indenture was executed, which after seven years was given to the pauper and was proved to have been lost. For 12 years past the pauper had resided at *Long Buckby*, during which time he had been often relieved by that parish, and had received *town's-money* from it; which *town's-money* is given away at *Christmas* to *parishioners*: and no further evidence was given by the appellants. But the respondents proved by the deputy register and comptroller of the apprentice duties, that it did not appear that any such indenture had been stamped with the premium stamp, or inrolled, from the year 1773 to the 16th of *July* 1805. The respondents insisted that the appellants ought to have given further proof of the payment of the duty, and of the inrollment: but the Court were of opinion that after the length of time elapsed they might presume that all had been rightly done. And the pauper having done no other act to gain a settlement, the order was quashed.

When this case was called on, *Dayrell* and *Beaucherk* were to have supported the order of Sessions: but *The Court* desired to hear what objection could be urged against the presumption which the justices had made from length of time, which did not appear to be an unreasonable presumption.

Morrice, contra, said, that the justices could not properly presume that every thing had been rightly done when the indenture was executed, against the evidence adduced by the stamp officer to show that the duty had not been paid; for if the duty had been paid, the presumption was, that it would have been inrolled at the head office in *London*, in the usual and proper manner.

Lord ELLENBOROUGH, C. J. The question before the justices was, whether the presumption that all was rightly done, after the lapse of so many years, were sufficiently rebutted by the negative evidence of the officer: they thought not, and we cannot say they have done wrong; for the presumption of law is to be

mont v. Murgatroyd, 3 Yeates, 27. *Savage v. Pleasants*, 5 Binn. 403. *Reynolds v. Ocean Ins. Co.*, 22 Pick. 191. *Ches. Ins. Co. v. Stark*, 6 Cranch, 273. *Mellon v. Louisiana State Ins. Co.*, 5 Martin N. S. 563. *Earl v. Shaw*, 1 Johns. Cas. 313. *Hudson v. Harrison*, 3 B. & B. 97, 106. So, the Insurers must reject the abandonment in a reasonable time. See 3 B. & B. ib.—W.]

favoured; and against the negative evidence they may have set the possibility of an irregularity in the returns made to the office.

Per Curiam,

Order of Sessions confirmed.(a)

Board, one, &c. v. Parker.

7 East, 47. Nov. 20, 1805.

Attornies *plaintiffs* are not within the *London Court of Conscience*, act 39 & 40 Geo. 3. c. 104, compellable to sue there for a debt under 5*l.* at the peril of costs.

THE plaintiff, who was an attorney of this Court residing in *Bath*, did business there for the defendant, and brought his action in *B. R.* for 4*l.* 19*s.*, as appeared by the bill of particulars, and obtained a verdict for 4*l.* 8*s.* 6*d.* at the last assizes at *Bridgewater*. And a rule was obtained in this term, calling upon the plaintiff to shew cause why a suggestion should not be entered on the roll under the stat. 39 and 40 Geo. 3. c. 104, (local acts) that the original cause of action did not exceed 5*l.* and that the same was recoverable in the Court of Requests of the city of *London*: which rule was founded upon an affidavit, that at the time of the debt contracted, and of the action commenced, and from thence hitherto, the defendant was an inhabitant of and resident within the city of *London*, and liable to be sued in said Court of Requests.

Lens, Serjt. and *Burrough* shewed cause against the rule, and contended that *attornies*, *plaintiffs*, were not within the act, though *attornies*, *defendants*, were brought within it by the 10th clause. The preamble recites doubts whether "*attornies* and *solicitors*, and other officers of any of the courts of "*law or equity were subject to the processes of the said court,*" which can only apply to such persons sued as *defendants*; and then the 10th clause enacts, "*that no privilege shall be allowed to exempt any person from the jurisdiction of the said court on account of his being an attorney, &c., but that all at-*" *tornies, &c. shall be subject to the several processes, orders, judgments, and* "*executions of the said court, in the same manner as any other persons,*" &c. Now *plaintiffs* cannot be subject, as such, to *processes* or *executions*: and though *judgment of nonpros* would apply to them, yet taking the words in the order in which they stand, it appears that the *judgments* meant were judgments against those thereby made *subject to processes* especially as followed by *executions*. And the operation of the whole clause was to prevent such persons from availing themselves of their privilege to be sued in their own courts. Besides, there is good reason for the Legislature making a distinction in this respect between *attornies plaintiffs* and *attornies defendants*; for if the former were within the Court of Conscience act, they would be let loose from all the restraints of the stat. 2 Geo. 2. c. 23. s. 23, where the demand was for less than 5*l.* They then referred to *Gardner v. Jessop*, 2 Wils. 42, where it was holden that an attorney *defendant* was not within the *Middlesex Court of Conscience* act, 23 Geo. 2. c. 33, containing words as general as the general provision in the act in question; which construction was confirmed in *Wiltshire v. Lloyd*, Dougl. 381; and to *Hussey v. Jordan*, B. R. T. 25 Geo. 3. ib. 382, cited in the latter case, where a *plaintiff* attorney was determined not to be within it.

Pell, in support of the rule, relied upon the positive provisions of the stat. 39 and 40 G. 3. c. 104, including *attornies* by name. There was no question, even before that act, that *attornies plaintiffs* might sue in the *London Court of Conscience* as it existed under the former acts; the only question was, Whether *attornies defendants* were subject to the process of the Court, of

(a) Vide *Rez v. East Knoyle*, Burr, S. C. 151, and *Rez v. Badby*, 1 Const. 490.

which the doubt is recited in the preamble: then the 10th section expressly enacts, "that no privilege shall be allowed to exempt *any* person from the jurisdiction *on account of his being an attorney*," &c. than which nothing can be more general, to include attorneys *plaintiffs* as well as *defendants*; and then it proceeds, "that all attorneys, &c. shall be subject to the several processes, *orders, judgments, and executions* of the said court in the same manner as *any other persons* are subject," &c.; using the same words as occur in the 5th section, which certainly includes *plaintiffs* as well as *defendants*. Then the case of attorneys being declared by the 10th sect. not to be exempted from the operation of the act, the general words of the 12th sect. will attach upon them as well as upon others.

LORD ELLENBOROUGH, C. J. The case of attorneys plaintiffs having been holden not to be within the act of the 23 Geo. 2. c. 33, establishing the *Middlesex* Court of Conscience, the words of which are equally general with the act in question, the same reason holds for determining that attorneys plaintiffs are not within the latter. And this act itself furnishes a ground for this construction in aid of the established precedent; for it recites a doubt whether attorneys were subject to the *process* of the *London* Court of Requests, which can only apply to attorneys *defendants*, and then by s. 10. it expressly *subjects* attorneys to the several "*processes, orders, judgments, and executions*" of the said court: which words, standing in that order, and with reference to the doubt stated in the preamble, must be taken to refer to *defendants*; and then the maxim applies that *expressio unius est exclusio alterius*. It therefore seems, that the Legislature itself meant to make the distinction. And if the meaning of the act of parliament were only doubtful, it certainly is one which the court would not be inclined to extend the construction of beyond what they were compelled to do by the terms of it: for it is sufficiently hard upon any person, residing perhaps at a great distance from *London*, to be compelled to go and prosecute his suit there for a trifling sum, because his debtor lives there.

The other judges concurred upon similar grounds.

Rule discharged.

The like rule had been obtained in another case of *Hodding v. Warrant*, in this term, under circumstances similar to the above, with this difference only, that both plaintiff and defendant were attorneys: against which *Burrough* and *Casford* were to have shewn cause; but *Erskine* and *Comyn* abandoned it, as not being distinguishable from this case.

Macmichael v. Johnson and Others.

7 East, 50. Nov. 22, 1805.

An allegation that a co-defendant was, by due course of law outlawed at the suit of the plaintiff in this plea and suit, is sufficient without a *provat patet per recordum*.

THE declaration stated, that the defendants and one *H. G. Macnab*, which said *H. G. Macnab* by due course of law has been outlawed at the suit of the plaintiff in this plea and suit, and still remains so outlawed, heretofore, to wit, on, &c. at, &c. according to the usage and custom of merchants, made their certain bill of exchange, &c. and so the plaintiff proceeded to count in the usual form as the payee of the said bill, which was dishonoured, against the drawers. To this there was a demurrer, stating for special cause, that it is not alleged in the declaration that there is any record of the supposed outlawry therein mentioned, nor has the plaintiff offered to verify his allegation by the same record; and that neither the time of the outlawry was mentioned, nor that *Macnab* was outlawed in the court of our lord the king before the king himself: and joinder.

W. E. Taunton, in support of the demurrer, said, that the allegation of the outlawry should have run thus: "which said *H. G. Macnab* by due process of law had in the court of our lord the king, before the king himself here, was and still is outlawed at the suit of the plaintiff in this same suit in the same court of our said lord the king, as by a record thereof now remaining in the said court and in full force appears." And this, he said, ought to be alleged in order to enable the defendants to take a specific issue upon the existence of the record itself of outlawry: for to a proper averment of outlawry *nul tiel record* may be pleaded, *Coutanche v. Le Ruez*, 1 East, 133, and *Nowlan v. Geddes*, ib. 634. In *Gye v. Geddard*,^(a) in case upon a joint contract against two, one was outlawed, and before declaration against the other it was entered on the roll "*Et sciendum est quod A. B. (the party outlawed) is outlawed*;" and this was holden to be no sufficient averment of outlawry, and judgment against the other was thereupon arrested. And in *Symonds v. Parmenter and Barrow*, 1 Wils. 78. 86. 97, which was a joint action, the reporter states, that in the declaration the record of outlawry against *Barrow* was set forth, as was necessary: and the defendant *Parmenter* craved oyer of the original writ and record of outlawry, and then pleaded *nul tiel record*. So in *Wightman v. Mullens*, 2 Stra. 1226, in an action against the marshal for an escape, it was alleged that the prisoner was committed to the custody of the marshal at the suit of the plaintiff, as by the said commitment may more at large appear; and this was holden ill on special demurrer, because it did not appear that the commitment was of record, till when the prisoner was not in point of law in the marshal's custody. That, as well as the present, was the case of a collateral averment.

Marryat, contra, was stopped by the Court.

Lord ELLENBOROUGH, C. J. If this had been an averment of some extrinsic record there might have been some foundation for the objection, that it is not pleaded with a *prout patet per recordum*; but this is no averment of any collateral record, but that the other defendant has been outlawed at the suit of the plaintiff in this plea and suit now pending; so that the very record now before the Court is the thing which verifies that averment. And no one instance can be produced where an outlawry in the same suit has been deemed necessary to be pleaded with a *prout patet*. What is said in the report of *Symonds v. Parmenter*, as to the necessity of setting forth the record of outlawry against a co-defendant, is merely the language of the reporter, for which there is no foundation: all that the Court decided there was, that if the outlawry were set forth, it must appear to be consistent with the other proceedings in the cause stated on the record; and that if it were not, advantage might be taken of it.

The other Judges concurred, and *Lawrence*, J. added, that it never had been usual in his own experience, or in that of any of his brethren, some of whose experience in pleading had been very extensive, to allege the outlawry of a co-defendant in the suit with a *prout patet*, &c. And on reference to the more ancient precedents he could find no such averment in Brownl. Rediv. 197. 1 Lill. Entr. 20. 1 Brown. 177. He also referred to *Impey's Pleader*, 341.

Judgment for the defendant.^(b)

(a) 1 Sid. 173. The same case is reported 1 Keb. 642, where it is said to have been adjourned: and one of the objections there taken was, that it was not said that the defendant was outlawed *super breve illud*: and another was, that the *sciendum* was no express averment; especially as there placed.

(b) In *Saunderson and another v. Hudson*, 3 East, 144, the allegation of outlawry was "which said *J. S.* and *J. D. L.* have been in due manner outlawed in the said court of our said lord the king before the king himself, and still are, remain, and continue outlawed;" and this was holden not to be sufficient without adding that they were outlawed in that suit: but no *prout patet* was contended to be necessary.

Kitchen v. Bartsch.

7 East, 53. Nov. 22, 1805.

It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves, and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his *after* acquired as well as present personal property and debts.

IN *assumpsit*, the first count was upon a promissory note made by the defendant on the 15th of *August* 1801, to the plaintiff for 50*l.*, payable eight months after date. The second count was upon another promissory note for 30*l.*, payable to the plaintiff at six months after the same date. And the sixth count was for money lent. Upon all the other counts a *noli prosequi* was entered. Pleas; 1. *Non-assumpsit*. 2. That the plaintiff, before the promises and causes of action in the declaration mentioned, being a trader, &c. and indebted to *W. S.* in 100*l.*, became a bankrupt; and thereupon a commission of bankrupt issued on the 5th of *June* 1801, of that date, on the petition of *W. S.*, by virtue of which he was duly declared a bankrupt; and that afterwards, and before the making of the promises, viz. on the 7th of *July* 1801, by indenture made and signed by three of the commissioners (in the custody of *W. S.* and *S. D.* and not of the defendant) "all and singular the goods, chattels, wares, and merchandizes, effects, debts, sum and sums of money, and all other personal estate whatsoever, whereof the plaintiff was possessed, interested in, or entitled unto at the time he became a bankrupt, or at any time since, and all the estate, right, title, interest, equity of redemption, property, claim, and demand whatsoever of the plaintiff of, in, or to the premises or any part thereof, were in due manner bargained, sold, assigned, and set over to the said *W. S.* and *S. D.* in trust for the benefit of the creditors of the plaintiff." And that the several promises and causes of action in the declaration mentioned were first made and first accrued to the plaintiff after the time when he was so adjudged a bankrupt, viz. on the said 15th of *August* 1801; and that the plaintiff has never obtained his certificate. That after the making of the promises, &c. viz. on 1st of *November* 1804, the said *W. S.* and *S. D.* as assignees as aforesaid, required the defendant to pay to them the several sums in the declaration mentioned, supposed to be due from the defendant to the plaintiff; by reason of which premises, and of the said indenture, and by force of the statutes, &c. the said *W. S.* and *S. D.* as such assignees, &c. became and were entitled to the several sums and causes of action in the declaration mentioned, if any such there are, &c. Replication: That the promissory notes in the first and second counts were made by the defendant to the plaintiff, and the money in the 6th count was lent by the plaintiff to the defendant, after the plaintiff became a bankrupt, and after the issuing of the commission, and after the making of the assignment in the last plea mentioned; and that the several promises and causes of action, &c. accrued to the plaintiff after he became a bankrupt, and after the said commission and assignment, &c.: and that the defendant, at the times when the said promissory notes were made and delivered by him to the plaintiff, and when the said money was lent, &c. treated with the plaintiff as a person capable of receiving credit in those behalves. And that the said commissioners, &c. have not at any time since the making the said notes, &c. nor since the said money was lent, &c. nor at any time since the several causes of action, &c. accrued,

bargained, sold, assigned, or set over to the said *W. S.* and *S. D.* or to any person in trust for the creditors of the plaintiff the said promissory notes or the said money mentioned to be lent, &c. or any of the estate and effects of the defendant which accrued or came to the plaintiff since the making of the assignment in the plea mentioned, &c. General demurrer, and joinder.

Richardson, in support of the demurrer, contended, 1st, that the general assignment of the bankrupt's estate and effects from the commissioners to the assignees passed the *future* as well as present personal property of the bankrupt: and, 2dly, that notwithstanding the defendant may have, as it is said, treated with the plaintiff, the bankrupt, as a person capable of credit, yet he may still dispute his right to recover after notice from the assignees. 1st, It is not necessary to question but that a bankrupt is entitled as against all others than his assignees to future earnings made after his bankruptcy. But he has only a qualified right, subservient to that of his assignees. The stat. 13 Eliz. c. 7. s. 11, first gave the *future* effects of a bankrupt to his creditors whose debts remained unsatisfied. And in *Fowler v. Down*, 1 Bos. & Pull. 44. 8, where the Court held that an uncertificated bankrupt might maintain trover for goods assigned to him as a security for money advanced by him after his bankruptcy, and which were in the hands of a third person, *Heath*, J. stated that the ancient practice was for the commissioners to assign specific parts of the bankrupt's property to each particular creditor, till the stat. 5 Geo. 2. c. 30, which directs the choice of assignees for the benefit of all the creditors, when it became the practice to make a general assignment. And the distinction was taken by Lord *Hardwicke* in the case *Ex parte Proudfoot*, 1 Atk. 252, that all *future personal* estate is affected by such assignment, and that every new acquisition vests in the assignees: but that as to *future real* estates, there must be a new bargain and sale. And this, as applicable to *personal* estate, was recognized in *Evans v. Mann*, Cowp. 560, and in *Martin v. O'Hara*, ib. 823. In *Tudsey v. Bourn*, 2 Burr. 716, there was indeed a second assignment in fact made of a *legacy* which had been bequeathed to the bankrupt after his bankruptcy; but that was *ex abundanti cautela*, and no opinion given as to the necessity of it. The only *dictum* in support of the necessity of such a subsequent assignment of personal property acquired after the bankruptcy is the extrajudicial opinion of the Lord C. J. *Eyre*, in *Fowler v. Down*; for the only point necessary to be decided, and on which the rest of the Judges did decide the case, was, that as against all the world *except the assignees* the bankrupt had a property in after-acquired goods: and it is clear that even a special property is sufficient to maintain trover: as in *Armory v. Delamirie*, 1 Stra. 505. But here the assignees have disaffirmed the property in the bankrupt; and the Court must presume that there are unliquidated debts of the bankrupt remaining; the commission still subsisting, and no certificate having been granted, and the assignees having put in their claim: at least sufficient appears to call on the plaintiff to shew that all his prior debts were discharged. 2dly, The answer to the plea set up in the replication, that *the defendant treated with the plaintiff as a person capable of credit*, is founded on what was said by *Buller*, J. in *Fowler v. Down*: but as he also admits that the assignees may disaffirm the bankrupt's title to after-acquired property, and that "if they claim they shall succeed," it reverts to the original question of property. And all the authorities, taken together shew that the bankrupt has only a qualified right to property acquired after his bankruptcy and before his certificate, that is subject to the claim of his assignees, and as against all the world but them. *Ashley v. Kell*, 2 Stra. 1207; *Hopkins v. Dewar*, Bull. N. P. 153, and Ca. K. B. 409; *Laroche v. Wakeman*, Peake's N. P. Cas. 140; *Silk v. Osborn*, 1 Esp. N. P. Cas. 140; *Evans v. Brown*, ib. 170, and *Webb v. Fox*, 7 Term Rep. 391, and vide *Webb v. Ward*, ib. 297. If there be any exception to the general rule it is in favour of the exclusive claim of the bankrupt to his personal earnings, as it seems to have been considered

in *Chippendale v. Tomlinson*; (a) though there was no interference of the assignees, as in this case. There is however, no allegation that the promissory notes in question were the earnings of the bankrupt's *personal* labour, which ought to have been pleaded if meant to be insisted on: though if they were, yet having been reduced into the shape of general property, they would at any rate become liable to the claim of his assignees.

Littledale contra. The mere circumstance of becoming a bankrupt does not deprive a man of his property till an assignment of it under the bankrupt law: the commissioners themselves have no property in the bankrupt's estate and effects, but only a power to assign them for the benefit of the creditors. The stat. 13 Eliz. c. 7. s. 2, directs the assignment to be by deed indented and inrolled to each of the creditors rateably in proportion to his debt: that applies to existing property at the time. Then the 11th section extends to his future estates and effects (where the debts remain unsatisfied), and directs that they shall "by the commissioners, &c. be bargained, sold, extended, delivered, and used for payment of the creditors in *such like manner and form* as other the lands, &c. goods and chattels of the bankrupts, which they had when they were declared *first* to be bankrupts." Next, the stat. 1 Jac. 1. c. 15. s. 13, enables the commissioners to assign debts due, or *to be due*, to the bankrupt, to the use of the creditors. The stat. 5 Ann. c. 22, first directed the commissioners to assign the bankrupt's property to general assignees, which was followed by the stat. 5 Geo. 2. c. 30. s. 26. 30, making the like provision. And even since these statutes it has never been doubted but that there must be a new assignment of *future real* estate. Then what distinction is there between *real* and *personal* estate in this respect, since it is admitted that there must be an assignment of the latter in the first instance as well as of the former? With respect to wills where the distinction exists, it is founded on the statute of wills, 34 H. 8. c. 5. s. 1, which only gives a power to devise lands which the party has at the time of making his will; the words of the statute being "*having* lands." But with respect to personal property, the will is ambulatory till the death: though perhaps the better reason is, that the legatee claims under the executor, who has the legal estate in trust for him. [Ld. *Ellenborough*, C. J. asked why *future* debts *to be due*, as well as debts due at the time to the bankrupt, might not pass by one deed, under the stat. 1 Jac. 1. c. 15. s. 13, which says "that the *same* grant (not grants), assignment, or disposition of the said debts, in form aforesaid to be made by the said commissioners, shall vest the property," &c.] That only means that the *debts* might be assigned by the *same* instrument as the rest of the bankrupt's estate. [Ld. *Blanc*, J. If the words will admit of two senses, does not the universal practice, not to make a separate assignment of future personal property, shew the sense in which they have been always understood since the passing of the act?] Here only existing debts were assigned, and not such as might *thereafter become due*: (to which it was answered, that the assignment was in the common form.) In *Jacobson v. Williams*, 1 P. Wms. 383, Ld. Chan. *Cropper*, in answer to one objection that the assignment was made by the commissioners before the legacy in question had vested in the bankrupt's wife, seemed to consider that a new assignment would supply the defect: and Ld. C. J. *Eyre's* opinion in *Fowler v. Down*, 1 Bos. & Pull. 47, is very strong as to the necessity of a new assignment. And the opinion of Ld. *Hardwicke* to the contrary in *Ex parte Proudfoot*, 1 Atk. 253, was not necessary; for the petition was dismissed. 2dly, The defendant, having

(a) Tr. 25 G. 3. B. R. Cook's Bankt. L. 260, 1st edit. In my MS. note of that case, Mr. Justice *Buller* says, "that the bankrupt had an undoubted right to sue for the profits of his labour; but supposing a person in his situation should gain a large sum of money or considerable effects, then such money and effects would undoubtedly be liable to his assignees."

treated with the plaintiff as a person capable of credit, cannot now object to the want of his certificate, however the plaintiff may be answerable over to his assignees, or however the assignees might have sued the defendant. And the defendant might have avoided all difficulty by paying the money to the assignees. The cases of *Chippendale v. Tomlinson*, Cooke's B. L. 260, and *Osborn v. Silk*, 1 Esp. N. P. Cas. 140, establish the distinction, that the assignees have no claim upon the personal earnings of the bankrupt : and that the contracting party having treated with the bankrupt as a person of credit is precluded from objecting to the action by him for the value of his work and labour and materials furnished after the bankruptcy. Then if it were competent for the bankrupt to contract at all, the contract must be mutual, and the notice given by the assignees cannot vary it. Besides, the recovery of the money by the bankrupt is not inconsistent with the claim of the assignees, to whom he is accountable, and who may sue in his name.

Lord ELLENBOROUGH, C. J. If this were a case in which we were called upon to decide for the first time upon a recent statute framed in the terms of the stat. 13 Eliz. c. 7, there would be strong ground for the argument that a second assignment of after-acquired personal property was as necessary as a second assignment to pass lands acquired by the bankrupt after his bankruptcy ; which latter has always been made. But the uniform tenor of the decisions has been, that the general assignment of personal property by the commissioners in the first instance passes all the future acquired as well as present personal property of the bankrupt. And that opinion has always prevailed in practice, though perhaps the opinion obtained at first without duly weighing the words of the 11th section of the statute. But after so great a length of time, and such a mass of property conveyed in this manner, it would be too much now to say that all which has been done is erroneous, and to put a new construction upon the act : especially when the argument in support of the construction which has prevailed on the statute of Elizabeth has acquired force from the wording of the statute 1 Jac. 1. c. 15. s. 13, which directs that the commissioners shall have power to grant and assign all debts *due or to be due* to the bankrupt to the use of his creditors by the same grant, assignment, or disposition, &c. Now, whether or not the practice of making but one assignment of personalty, including future as well as present acquired property, has grown up by adverting to this provision in the statute of James as construing and controlling the meaning of the statute of Elizabeth I do not know ; but certain it is, that since the statute of James the opinions and practice have been uniformly one way ; and it would now be highly dangerous to revert to a critical exposition of the words of the statute of Elizabeth. *Tudway v. Bourne* seems to be the only case where a second assignment of personalty is said to have been made : but nothing turned on that. And though some opinion on the subject was thrown out in *Jacobson v. Williams*, yet it was not made the ground of decision. I observe what is said by the Chief Justice in *Fowler v. Down*, which if it were *res integra*, might have great weight : but it is not fit to enter too deeply into a critical disquisition upon the words of an act of parliament of long standing, as if it had passed but yesterday, laying aside the experience and practice of centuries. And all the other Judges there agreed, that if the assignees claimed, they were entitled to the property : and such also was the opinion of Lord Kenyon in *Laroche v. Wakeman*. Then, 2dly, it is contended that the objection cannot be set up by a third person ; and *Chippendale v. Tomlinson* is referred to, as shewing that the bankrupt is entitled to the earnings of his personal labour ; without which, it is said, he would be left to starve, which could not have been intended by the Legislature. The hardship of that case might perhaps have warped the opinion of the Judges, when the evil might have been better remedied by statute. There is now, however, an inveterate practice of above 20 years in support of that series of cases. But

no question of that sort arises here. And with respect to the defendant's having given personal credit to the bankrupt, and thereby concluded himself from objecting to his want of property in the notes sought to be recovered, the answer is plain, that if I treat with a man upon the footing of his having property in a thing, and it afterwards turns out that he had none, the very foundation on which I treated with him fails. Then the assignees, whose property this is, have done everything short of force to reclaim it: they have required the defendant to pay the money to them. Those, therefore, who are admitted by the general current of authorities to be competent to disaffirm the right of the bankrupt, have disaffirmed it by insisting upon their own claim.

GROSE, J. After the opinion of so able a judge as Lord *Hardwicke*, delivered in the case of *Ex parte Proudfoot*, and the practice which has ever since subsisted, it would be removing landmarks to doubt the power of the commissioners to assign the future personal property of the bankrupt, as well as that which he had at the time of the bankruptcy. Then it is impossible, after the general assignment, for the bankrupt, who has never obtained his certificate, to recover this debt against the consent of his assignees, who have the legal right to it. And this doctrine has been confirmed by Lord *Mansfield* and Lord *Kenyon*.

LAWRENCE, J. I am of the same opinion on both points. It is too late now to give a new construction to the statute of Elizabeth, different from what has always hitherto prevailed. And in all the modern cases where the action brought by the bankrupt against third persons has been sustained, it has been distinctly stated, that the bankrupt can only recover where the assignees do not interfere: and here it is expressly stated, that they do interfere, and require the defendant to pay the debt to them. Then if the plaintiff meant to insist that the assignees were suing in his name, that should, if material, have been replied.

LE BLANC, J. All doubt upon this subject ought to be at rest. For whatever opinions may have been thrown out by different Chancellors or Judges, it has been long ago determined, that no second assignment of personal property coming to a bankrupt is necessary. The only case where it ever appears to have been made is in the case of a legacy; and the general practice has been invariably otherwise, and it would be dangerous to shake it. Then, 2dly, all the cases admit that the superior title of the assignees must prevail where they come forward. Where interlocutory judgment has been recovered by one who afterwards becomes bankrupt, the Court has always listened to the application of the assignees to proceed with the suit in the bankrupt's name.(a) So, on the other hand, in applications for costs; where an action has been brought by the assignees for their own benefit in the bankrupt's name, the Court has required them to give security for the costs.(b) All that the Courts have said in any case is, that where the assignees do not interfere, one who has contracted with the bankrupt after his bankruptcy shall not protect himself on their account against the claim of the bankrupt: but that is in effect saying, that if the assignees do claim adversely, the bankrupt shall not recover from the party that which is in law the property of the assignees, and claimed by them.

Judgment for the Defendant.

(a) Vide 2 Tidd's Pract. 844.

(b) Ib. et vide *Webb v. Ward*, 7 Term Rep. 296.

The King v. The Hon. Robt. Johnson.

7 East, 65. Nov. 23, 1805.

The publisher of a Public Register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters *should be* directed; to which an answer is returned in the Register; after which he receives two letters in the same hand-writing, directed as mentioned, and having the *Irish* post mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed; this is a sufficient ground for the Court to have the letters read: and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the Register in *Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in *Middlesex*.

THE plea of the defendant, one of the Judges of the Court of Common Pleas in *Ireland*, to the jurisdiction of this Court, having been over-ruled, (a) he pleaded not guilty to the indictment found by the grand jury of the county of *Middlesex*; which charged him with the publication in that county of certain libels upon the Administration of Government in *Ireland*, and amongst others upon the Lord Lieutenant and Lord High Chancellor of *Ireland*; and the trial was had on this day at the bar of the court by a jury of the county of *Middlesex*. In the course of the trial, the publication of the libels having been proved to be made in that county, by insertion of them in Mr. Cobbett's *Weekly Register*, which was printed and published in *Westminster*, the following evidence was given on the part of the crown to shew that such publication was made by the procurement of the defendant. Mr. Cobbett, the publisher of the Register, proved that before the publication of the libels in his paper he had received an anonymous letter (the original of which he believed to be destroyed) in the same hand-writing as the libels which he afterwards received; in which letter (parol evidence of which was admitted, after objection taken and over-ruled, to be given for this purpose) the writer inquired whether it would be agreeable to Mr. Cobbett to receive for publication in his Register certain information of public affairs in *Ireland*: and if it were, he was desired to say to whom such information was to be directed. In consequence of the receipt of this letter, which was published in the Register, Mr. Cobbett, through the medium of the same Register, requested the promised information to be directed to Mr. Budd, No. 100, *Pall Mall*, whose shop was at that time used by Mr. Cobbett for the publication of his Register, where letters of communication were addressed to him, and from whence he received them; his own house being in *Duke-street, Westminster*. After this intimation Mr. Cobbett received in due time two several letters, containing different parts of the libels in question, both in the same hand-writing with the letter previously received. Both the letters came under cover, but the covers were believed to be either destroyed or lost, having been thrown aside as useless; and therefore parol evidence was admitted to prove that they had the *Irish* post mark upon them, and were directed in the manner pointed out in the Register. The first of the letters, dated 29th of *October* 1803, was received and the cover opened by Mr. Budd, who thereupon sent it, together with the cover opened, to Mr. Cobbett, in *Duke-street*, by a person in the office whom the witness did not recollect. But in consequence of his desiring Mr. Budd not to open any other letters so directed, Mr. Cobbett received the next letter, which came to Mr. Budd by a subsequent post, unopened. Several witnesses were then called, who, upon examination of the letters so re-

(a) Vide this case, upon demurrer to a plea to the jurisdiction of the Court, 6 East, 583—602.

ceived by Mr. *Cobbett*, swore to their belief of their being the hand-writing of the defendant, who at the period in question was an *Irish* Judge. It was then proposed by the *Attorney-General* that the letters containing the libels should be read, which he said contained internal evidence that they were written and sent by the writer to Mr. *Cobbett* for the purpose of being published in his Register. But previous to their being read,

Adam, Park, Lockhart, and Richardson, objected to the reading of the libels, upon the ground that there was no evidence to go to the jury of a publication by the defendant in *Middlesex*. Admitting, for the sake of argument, that the letters were in the hand-writing of the defendant, there was no evidence that he had sent them into *Middlesex* to be there published; nor any privity established between him and *Cobbett* the publisher. It was not proved that the envelopes were in the defendant's hand-writing; but papers written by him and not intended for publication might have fallen into the hands of another, who transmitted them to *Cobbett*. The mere circumstance of the envelopes having the *Irish* post mark upon them could not connect them with the defendant; who was not even proved to have been in *Ireland* at the time. (1) Neither did it appear that the first letter, which was opened by *Budd*, who was not called as a witness, was really contained in the envelope which was sent opened with it. The second letter was indeed connected with the envelope, but there was no evidence that either of the papers was received from the Post-office, which might have been ascertained by persons employed in that office. If it were urged that the papers themselves contained internal evidence that they were intended for publication, the same might have been urged in the case of the Seven Bishops, where there was clear proof of a publication in *Middlesex*; for the petition which had been prepared and signed by them at *Lambeth* in the county of *Surry*, was found in the king's hands in *Middlesex*, (a) and was addressed to him: and the only link wanted was, that it came there by the agency of the Bishops; (b) which was holden not to be supplied by the evidence of their acknowledgment of their hand-writing in that county: ib. 345—9. 360—365: in consequence of which Lord *Sunderland* was afterwards called to prove the delivery of it by the bishops to the king in *Middlesex*.

The *Attorney-General, Solicitor-General, Erskine, Garraw, Wood, and Abbott*, for the crown, were stopped by the Court.

LORD ELLENBOROUGH, C. J. Nothing which falls from the Court will overrule or tend to shake that which was soundly ruled in the case of the Seven Bishops, where the only evidence at first relied on was of a confession by the defendants, extorted as it was, of their having owned in *Middlesex* their signatures to the petition which had been prepared and signed in the county of *Surry*; but there was no evidence of any publication of the libel, as it was then called (though it was nothing more than a decent and humble petition of those reverend persons to the king,) in the county of *Middlesex*, until Lord *Sunderland* was called, who gave evidence of a publication of the paper in that county proper to be left to the jury. But here there is no question of the fact of publication by Mr. *Cobbett* in *Middlesex* of that which is admitted to be a libel: and the only question is, Whether the defendant were accessory to that publication? For if he were, the offence is established. For one who procures another to publish a libel is, no doubt, guilty of the publication, in whatever county it is in fact published in consequence of his procurement. Now material evidence of the fact of such procurement may be collected from the papers themselves, as they have been opened by Mr. *Attorney-General*,

(1) That the post-mark of a particular place is not sufficient evidence of publication there, see *The King v. Watson*, 1 Campb. 215.

(a) The case of the Seven Bishops, 4 St. Tr. 337.

(b) The case of the Seven Bishops, 4 St. Tr. 344, 5.

which papers, as the proof at present stands, are in the hand-writing of the defendant; and are said to answer the description of those which *Cobbett* had been previously desired to publish, and which papers came to his hands through the medium pointed out by him in his Register. How then can we be called upon to pronounce that there is no evidence to go to the jury of such procurement before we have heard read the papers themselves? I am therefore of opinion that we are bound in duty to receive the evidence.

GROSE, J. concurred in the same opinion.

LAWRENCE, J. The case of the Seven Bishops does not apply to the present. Before Lord *Sunderland* was called the only evidence against the defendants was of a confession by them in *Middlesex* of their hand-writing to a paper which was shewn them, which was stated to have been written in *Surry*; but that was no evidence of a publication by them in *Middlesex*. But here there is clear proof of a publication in *Middlesex* by *Cobbett*, and the only question is, Whether this were done by the procurement of the defendant? Then after it has been proved by the witness that he received a notification by letter that he should have papers of a certain description sent to him to publish, if he would undertake to publish them, to which he had given a public answer in his Register in the affirmative, directing to whom the papers should be sent: and when afterwards, in consequence of that communication, he receives papers through the channel pointed out by him, papers which are proved to be in the hand-writing of the defendant, (as it stands at present,) and answering, as they are said to do, the description of those before notified to him as intended for publication, must not the papers themselves be read? and is there not evidence to go to the jury for them to decide whether the papers were sent by the defendant, or by some other person?

LE BLANC, J. delivered his opinion to the same effect; and added, in answer to the objection that there was not strict evidence of a delivery of the letters by the post to Mr. *Cobbett*, that it was not material for the decision of the present question, how the letters came to Mr. *Cobbett*, whether by the post or a private hand; that was matter of observation to make to the jury. (1)

The libels were then read at length, and in addition to the libellous matter charged, contained various expressions declarative of the author's intention to have them published in the Register: and the latter paper contained an acknowledgment of the publication of the former part of the correspondence.

The defendant afterwards called witnesses to disprove the hand-writing, and went to the jury upon the fact that the libels were not in his hand-writing: but after a trial of some length, the jury found a general verdict of guilty.

The King v. The Commissioners of Sewers for the County of Somerset.

7 East, 71. Nov. 25, 1805.

By stat. 23 H. 8. c. 5, the jury, by whom a presentment is made to commissioners of sewers concerning what lands are within a level and subject to a certain rate, ought to be summoned by the sheriff *from the body of the county* in pursuance of a precept directed to him from the commissioners for that purpose. And a presentment made by a *standing jury*, constituted according to ancient usage, originally returned by the sheriff, at the commencement of every new commission of sewers, *from certain parishes or districts* composed of land owners there, interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the *foreman* of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen, is illegal and void: and the want of jurisdiction of such presenting jury cannot be waived by traversing their presentment, and

(1) Vide *The King v. Watson*, 1 Campb. 216.

going to trial before another jury properly returned from the body of the county, by whom such presentment was confirmed. The presenting jury, after being sworn and charged, must also prosecute their inquiry upon hearing evidence on oath before the commissioners in *curia*, and make their presentment thereon, and not upon information collected in *pais*, without oath.

UPON a rule to shew cause why certain presentments and other proceedings had before these commissioners, and which were returned by *certiorari* into this Court, should not be quashed for illegality and improper practices, it appeared that in *Easter* term 43 Geo. 3, a *mandamus* had issued to the commissioners to make a rate on the owners of lands, &c. within the level of *Huntspill* in the county of *Somerset*, which might have loss by inundations of the sea for want of a sufficient sea-wall there, or be benefited by such wall, for repaying to *B.* and other certain sums advanced by them to *R. S.* the collector appointed by a decree of the commissioners in *June* 1799, for the purpose of making a sufficient wall there; and which decree directed the money so advanced to be reimbursed by a rate made on the level. In consequence of this *mandamus*, and of attachments obtained against the commissioners in *Hilary* term 1804, the execution of which was suspended, the commissioners, on the 20th of *April* 1804, issued a precept under their hands and seals to the sheriff of the county, directing him to issue his warrants, and cause to be summoned the foreman of the several juries of *Huntspill*, *Burnham*, &c. *Purton*, and *Paulett*, to appear before the commissioners at a session of sewers at *Bridge-water* on the 4th of *May* 1804, to receive their charge and instructions for returning correct lists of all the occupiers of lands, &c. within their respective views, lying within the level of *Huntspill*. In consequence of which precept the sheriff issued his warrant to the clerk of the sewers to summon in his name the foreman of the several juries, who were summoned accordingly. It appeared from the affidavits of the clerk to the commissioners and of other persons, (made in support of the presentments after mentioned,) that the mode of forming juries, as far back as living testimony went, and the records of proceedings before the commissioners of sewers for the county could be traced, and immemorially as they believed, was this; on the issuing of any new commission of sewers, the commissioners issued their precept to the sheriff of the county to summon juries for the different parishes or districts in the county, who, upon their appearing at the next court of sewers appointed for that purpose, nominated one out of each set of jurors so returned as their foreman. That the jurymen so named had always consisted of persons residing in or near the parish or district where their views had immemorially been made, as persons having the best local knowledge and information of the subjects of their presentments, and were more or less numerous according to the extent of their several views, which were well known: and that the foreman(a) and other jurymen were sworn by the commissioners to inquire and present all defaults, impediments, and annoyances, &c. within their view, and all such other matters as they ought to present as long as they continued in office. That in no instance was it known that any of the juries had intermeddled with each other's views. That every jurymen so returned and sworn generally continued for life, unless discharged by the commissioners for good cause, in which case some other fit person was sworn into the jury in like manner: but that it was not usual to re-swear them, except only when a new foreman was chosen. But

(a) The foreman's oath was as follows: "You, as foreman of ——— jury of sewers, shall swear that you, together with your jury, shall diligently inquire, and at all sessions of sewers whereunto you are lawfully summoned, a true presentment make, of all impediments, defaults and annoyances of or by water found within your view, as also of all other matters and things which you as foreman of said jury ought to present, according to the best of your knowledge and judgment, and as long as you shall continue in the office, without any concealment." The jurymen's oath was the same, *mutatis mutandis*.

in the instances of the presentments of the *Huntspill* jury, and of the *Burnham*, *Paulett*, and other parish juries after mentioned, it appeared that the usual mode had been so far departed from, that the juries making those presentments had been previously re-sworn in court. That when such presentments have been traversed, then the practice has been to issue a precept to the sheriff to summon a jury to try the traverse from other parts of the county at large than those within the level in question. It further appeared, that in pursuance of the above mentioned summonses, the standing jury(a) of sewers for the parish of *Huntspill* attended a court of sewers at *Bridgewater*; and on the 20th of *May* 1804, received a charge from the Court to make a return of persons and lands within that part of the level of *Huntspill* which lay in the parish of *Huntspill* receiving benefit or avoiding damage by reason of the wall which had been erected; that they were to do this with the assistance of *C. C.* the surveyor of the level appointed by the decree, and were to hear evidence as to the quantity and value of each person's property so situated, and present a list of the same accordingly. The said jury attended again at an adjourned court on the 9th of *June*, when *C. C.* the surveyor being sworn, gave in a list of the persons and property within the parish of *Huntspill* liable to be assessed, which list was then adopted by the jury, and a presentment made and signed by them accordingly. At the next court, holden by adjournment on the 13th of *July*, the standing juries for the parishes of *Paulett* and *Pureton* severally received the like charge; and on the 27th of *July*, at another adjourned court, the surveyor being sworn, delivered in similar lists of the persons and lands in their respective parishes which would be liable to damage if the new sea-wall did not exist in the parish of *Huntspill*; but before his evidence was closed the standing jury for the parish of *Paulett* delivered in a presentment which had been previously prepared and signed, finding in substance that *no person or land within their parish would be damaged by inundations of the sea for want of the said wall, nor receive benefit by its erection.* And the *Pureton* jury then made a similar presentment. The *Paulett* and *Pureton* presentments were traversed at a court holden on the 31st of *August*: and at another court holden on the 6th of *October* following, those traverses were severally tried before juries summoned from the body of the county by the sheriff, in consequence of a precept directed to him by the commissioners for that purpose; and they, after hearing evidence on both sides, found verdicts in support of the respective presentments. The affidavits of the prosecutors alleged that most, if not all of the persons composing the standing juries for the several parishes were interested in negating the liability of their parishes to the expence and support of the sea-wall in question, being owners of land, &c. within the same on whom the expence would fall: and further charged several of the jurymen with having combined to make their returns. And then stated, that they had applied to the commissioners to summon a jury from the body of the county for the purpose of making the presentments in order to the making of a rate; that the commissioners issued their precept to the sheriff accordingly; who returned a jury to a court of sewers holden at *Bridgewater* on the 20th of *October*; but the commissioners then attending told the jury, that the court had been advised that they had no right to employ them to make a return of lands in the level, and thereupon dismissed them; and then ordered a precept to be issued to the sheriff to summon the standing juries for *Burnham* and the other parishes within the level to attend the court on the 9th of *November* 1804, on which day the respective juries attended, and being sworn, were charged to return all persons having lands, &c. in the level of *Huntspill* within their several views which had or might have benefit by preventing the inundation, &c. Each of these juries returned at an adjourned court holden

(a) It was the practice for the foreman when summoned to converse the other jurymen to attend.

on the 23d of *November*, that no person, &c. within their different parishes would be benefited by the sea-wall in question; and these presentments also, which were made without hearing evidence, though tendered, were alleged by the prosecutors to have been made through the like combination and interested motives, and by owners or occupiers of lands within the respective parishes; and circumstances were adduced to shew that they had been previously prepared. At the same court, about 60 traverses of the *Huntspill* presentment were entered, some of them in the names of jurymen who had signed the other presentments; and it was alleged that meetings had been holden by advertisement, and subscriptions entered into by jurymen and others who had taken part in the proceedings, for opposing the making and levying of the proposed rate. The affidavits in support of the presentments, in addition to the usage before mentioned, which had always prevailed, respecting the mode of summoning the presenting juries, alleged that the sea-wall in dispute in the parish of *Huntspill*, had immemorially been repaired by the owners of certain lands lying in that parish, who had let it fall to decay; and denied the necessity of the new works lately made to the same, and the benefit thereof to the parishes newly charged. And the affidavits of certain jurymen went to deny combination in themselves, or in others to their knowledge. The commissioners, defendants, also made affidavits, exculpating themselves from any intentional errors, and from all knowledge of improper practices in others; and submitting to act as the court should think proper to direct: and with respect to the dismissal of the jury summoned by the sheriff to attend before them on the 20th of *October* 1804, they answered that they had so done, because it appeared to them to be expected that the jurors so returned should be required to view all the lands in the level of *Huntspill*, and to assess such as were liable to contribute to the expence of repairing the said sea-wall; and that they had been advised that no instance had occurred of a jury having been impannelled and sworn for such a purpose, and that they had no power to compel the jury so to act.

Tripp appeared for the commissioners; and after adverting to their exculpatory affidavits, which acquitted them of any intentional error, admitted that the whole proceedings had been founded in mistake. He stated that commissioners of sewers were by law to proceed by view, (a) survey, ib. 106, 7, and presentment, ib. 108. They themselves were to view, and they were to appoint surveyors and other competent persons to go throughout and survey the level, and point out all defaults and obstructions proper to be remedied and removed; and in case of omission by the party complained of, the commissioners ought to summon an indifferent jury from the body of the county to hear the charge and defence by proper evidence upon oath, who were thereupon to make their presentment accordingly. Instead of which the presentments in question had been made by what were called *standing juries*, composed of persons having lands in the very district sought to be burthened, and consequently directly interested in the questions submitted to them; and these had mistaken their functions, and taken upon themselves to determine what lands were within the level.

The Court were all clearly of opinion that the presentments made by juries of the description mentioned could not be supported: and wished not to be called upon to give any opinion upon the criminatory parts of the affidavits in support of the rule: but suggested, that if there were any doubt whether such or such lands were within the level, it might best be tried upon issues, if the parties could agree upon them. It was however proposed by the counsel in support of the rule to leave the whole matter to arbitration, and the case stood over for a few days in order to obtain the consent of the other parties. But the proposal not being then acceded to,

(a) Vide *Callis on Sewers*, 105, 6.

Pell, Peake, and Moore, shewed cause against the rule, and endeavoured to support the presentments of the *Paulett* and *Pureton* juries, by referring to the usage which had at all times prevailed in that part of the county of having *standing juries*, as they are called, to make presentments to the commissioners of sewers within certain known limits. Commissions of sewers, they observed, existed before (a) the stat. 23 H. 8. c. 5, which gave them their present form; for the statute itself refers to proceedings before it was passed, and the usage was probably antecedent to the statute. The presentments do not conclude the rights of the parties, but merely serve as charges or exonerations to put the matters disputed in a course of trial; the objection, therefore, of interest in the jurors making the presentments is not so material as to vitiate a long established usage: especially when it is considered that they who have lands within the reach of the mischief are most interested in guarding themselves as well as others against it. The jurors are in the first instance returned by virtue of a precept issued to the sheriff to summon them: and there is this advantage derived from such a usage, that the persons so selected must, from their local knowledge, have better opportunities of informing themselves of nuisances affecting their district. In a case in *Styles*, (b) one of the exceptions taken to a presentment, on which it was quashed, was that "it did not appear that the breach was *within the hundreds: whence the jury came*; and so they had no authority to inquire:" which shews at least that the locality of the presenting jury was not considered as any objection under the stat. of Hen. 8th: and in other books (c) it is said, that the ancient practice and usage of the commission of sewers ought to be upholden. The presenting juries are charged at one court to inquire, and at the next court, being re-sworn, they make their presentments; and such presentments are traversable; and whatever objection might have been made to them in the first instance, it has been waived by the parties having actually traversed them, and gone to trial before a jury summoned by the sheriff from the body of the county, against whom there is no objection, and by whom the presentments of the standing juries have been confirmed.

The *Solicitor-General, Burrough, and Newbolt*, in support of the rule, were stopped by the Court.

Lord ELLENBOROUGH, C. J. I should be sorry to be pressed to give any opinion upon any other parts of the case than the mere legality of the proceeding: how it happened that a legal jury, summoned by the sheriff from the body of the county, were dismissed, and other vicious juries substituted in their place, the jurymen of which vicious juries are also charged with having entered into a previous combination to make certain presentments, I shall not at present inquire: but any thing more alien from judicial proceedings than these I never saw. There may be some use in the standing juries for the purpose of advising and assisting the commissioners in their inquiries; but not as juries to make presentments, being themselves also interested in the subject-matters of their presentments. In the first place, *the juries* were not summoned by the sheriff: the precept from the commissioners to the sheriff was to summon *the foremen* of the juries, and the return of the sheriff is that he has returned *the foremen*; there is no return of the jurymen themselves. That, therefore, is not pursuant to the act of parliament; which, at any rate, requires the presentment to be made by a disinterested jury returned by the sheriff, and not by a body aliene altogether to the jurisdiction. In the case referred to from *Styles*, there was no question but that the jury was to be returned by the sheriff. Then if there be a want of jurisdiction, it may be taken advantage of at any time, after verdict, as well as before; and no

(a) Vide *Callis* on Sewers, 24, which refers to Fitz. Na. Br. 113.

(b) 185, 191, 2. referred to in *Callis*, 110.

(c) Moor, 825. pl. 1113, and 19 Vin. Abr. Sewers, 418.

consent of parties can give jurisdiction where none is given by law. Then again, after the juries so summoned had met, instead of prosecuting their inquiries before the commissioners, by hearing evidence legally laid before them on oath, they were sent out, as it seems, to prosecute their inquiries all about the country, and upon information so picked up, they were afterwards to make their presentments. But this is not a judicial method of making the inquiry; the jury ought to be sworn before the commissioners, before whom also the inquiry is to be conducted, by evidence delivered upon oath, upon hearing which the jury are to make their presentment. The whole proceeding therefore is irregular.

The other Judges concurred in directing the presentments and other proceedings complained of to be quashed.

Randall v. Randall.

7 East, 81. Nov. 25, 1805.

Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference; if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award; which cannot therefore be enforced by attachment.

UPON a rule to shew cause why an attachment should not issue against the plaintiff for non-payment of 20*l.* 19*s.* 3*d.* a sum awarded against him; it appeared that the parties by their several bonds of submission referred to certain arbitrators to determine "all actions and controversies, &c. depending between them; and *also* of and concerning the value to be put on the *hop-poles* and potatoes in certain land (described in the award as land *first* thereinafter mentioned,) and the workmanship done thereto, and taxes and rates paid in respect thereof, by the defendant; and *also* concerning the *rent* to be paid annually by the plaintiff to the defendant for the land, (described in the award as *secondly* after mentioned), together with the costs, &c. so as the said award were made in writing and ready to be delivered to the parties on or before the 12th of *May*." Then the arbitrators by their award, after reciting the above, and that they had accepted the reference; and that the parties had delivered to them an account in writing respecting the matters referred as aforesaid, and that they had heard the parties and examined such witnesses as they had thought necessary touching the matters referred as aforesaid, and had duly considered *all* matters and things referred to them, found the value of the hop-poles and potatoes in the grounds mentioned to be 154*l.*, and the balance due from the plaintiff to the defendant (including that sum in the account) to be 28*l.* 19*s.* 8*d.*, which they therefore awarded to be paid, and the costs, &c. to be equally divided; but they did not notice, nor make any award concerning the *rent* to be paid annually by the plaintiff to the defendant for the land. Wherefore it was objected by

Comyn, on shewing cause against the attachment, that the award was bad upon the face of it, and could not be enforced. For that where several distinct matters are referred to arbitration, if it do not appear that the arbitrator has determined each of them, the award is void for the whole: and here the words "*so as the said award be made, &c. on or before the 12th of May,*" makes the submission conditional, that the award shall include *all* the matters referred. Though if the reference be of *all* matters in difference, and the award be *de præmissis*, generally, it shall be intended that the arbitrator determined all the matters submitted to him, unless the contrary be shewn; and he cited 1 Roll. Abr. 256. *Arbitrament, L. Ridsen v. Inglet*, Cro. Jac. 838; *Middleton v. Weeks*, Cro. Jac. 200; *Bradford v. Dryan*, Willes, 268, and *Baspole's case*, 8 Co. 98.

Espinasse, in support of the rule for the attachment, contended^{*} for the sufficiency of the award, so far as the arbitrators had determined the several matters mentioned. He observed, that the reference was not merely of such matters only, but of *all* actions, controversies, &c.; and the arbitrators upon the whole have found a balance of account in favour of the defendant to the amount of 20*l.* 19*s.* 8*d.* The Court then will presume that the arbitrators did decide on every matter, which was brought before them, unless the contrary were shewn by affidavit. And it is even said in *Baspole's* case, that though there be many matters in controversy, yet if one only be signified to the arbitrator, he may make an award of that: for he is to determine *secundum allegata et probata*; and it is in every day's practice that an award may be good in part and bad in part.

LORD ELLENBOROUGH, C. J. That is where it does not appear that there is any notice to the arbitrator upon the face of the submission that there is any other matter referred to him than those which are mentioned to him at the time of the reference. But here it does expressly appear that there was another matter referred, on which there is no arbitrament. The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was to be paid by the defendant for the hop-poles and potatoes in certain land: the third was to ascertain what rent was to be paid by the plaintiff to the defendant for certain other land. The authority given to the arbitrators was conditional, *ita quod*, they should arbitrate upon these matters by a certain day. If then they fail as to one of them, the condition has not been performed upon which the award was to have its obligatory effect: and here they have stopped short, and have omitted to settle one of the subjects of difference which was stipulated for. This is not like the case where an award, being good in part and bad in part, the good part shall not be vitiated by the arbitrator having also directed something to be done which is superfluous and bad. But here the very condition on which the parties submitted to the award has failed.

LAWRENCE, J. I did not know whether there might not have been some modern decisions, which had given a more liberal construction in support of awards, where the arbitrators, having distinct matters submitted to them, had made their award upon some of them only, omitting the mention of others; but as none such have been referred to, there seems to be no answer to the cases cited against this award, which shew that the arbitrators have not pursued their authority, not having performed the condition on which it was delegated to them.

LE BLANC, J. The contract of the parties is in effect this; one says, that he will submit to the arbitrators to ascertain what he is to pay for the hop-poles, &c. upon condition that it shall also be referred to them to decide what rent is to be paid for certain land. And he may fairly have said, that unless both those matters of difference were referred, he would not refer either of them singly. If then the arbitrators omit to decide one of them, the condition fails on which the reference was agreed to. (1)(2)

Rule for the Attachment discharged.

(1) Vide *Ingraham & al. v. Milnes*, 8 East, 445.

(2) [See *Huff v. Parker*, cited 4 Dal. 285. 3 Y. 567. *Bemas v. Quiggle*, 7 W. 362.—W.]

The King v. The Bailiffs of Ipswich.

7 East, 84. Nov. 26, 1806.

The stat. 2 G. 2. c. 22, and other acts of the same class, making general provisions for the relief of insolvent debtors, charged in execution on process issuing out of *any of the courts of law*, extend to *inferior* as well as *superior* jurisdictions. But the application in both instances must be made before the end of the next term after the prisoner is charged in execution; except he can shew that his neglect arose from ignorance or mistake.

THIS came on upon a rule calling on the defendants to shew cause why a writ of *mandamus* should not issue to them to make an order to cause one *Robt. Arnold*, a prisoner in execution in the common gaol of *Ipswich*, to be brought up to a court of Small Pleas to be holden for the town and borough, to take the benefit of the Insolvent Debtor's Acts. It appeared, that *Arnold* was charged in execution for 18*l.* in the custody of the keeper of the common gaol there on the 17th of *December* last, at the suit of one *Booth*, upon process issuing out of the said court, which is a court of law and record holden before the bailiffs, and proceeding by *capias ad respondendum* to final judgment and execution. That through ignorance and mistake, arising from misinformation as to the power of that court to discharge insolvent debtors, he had neglected to give the necessary notices and take the requisite steps towards procuring his discharge, till a court of Small Pleas, holden on the 7th of *October* last; when that Court, upon hearing the objections of the plaintiff, were of opinion that they had no jurisdiction to discharge the prisoner; conceiving that the statutes for relief of insolvent debtors applied only to prisoners charged in execution upon process issuing from the superior courts; and therefore refused to make any order for bringing him up to take the benefit of the acts. And the questions now were, first, Whether an insolvent debtor in execution under process sued out of an inferior court were entitled to the benefit of the several acts passed for the relief of insolvent debtors? And if he were, 2dly, Whether this party were in time to apply for his discharge?

Alderson shewed cause; and stated the ground on which the magistrates considered that they had no jurisdiction to discharge the prisoner to be, that the several general acts of parliament for the relief of insolvent debtors were confined to prisoners charged in execution on process originally sued out of one of the courts of *Westminster*, or who had been removed thither by *habeas corpus*, and continued charged in execution in one of the prisons of the same courts; which appeared as well from the express mention of the courts of *Westminster* in some of the clauses, as by references in others to the terms by which those courts alone are regulated in their proceedings. The st. 2 Geo. 2. c. 22. s. 8, enables prisoners charged in execution for debt not exceeding 100*l.* to petition any of the courts of law from whence the process issued for their discharge on the conditions therein mentioned: and the Court petitioned is required by order, or rule of Court, to cause the prisoner to be brought up accordingly. Then the st. 3 Geo. 2. c. 27, reciting the former act, and that it was found inconvenient to bring prisoners up from prisons at a distance to the courts in *Westminster-hall* as that act directs, enacts that after the first day of *Trinity term* then next, before any prisoner (except in *London*, *Westminster*, and *Southwark*,) shall petition any of the Courts in *Westminster-hall* from whence the process issued on which he was charged in execution, he shall give notice to his creditors, at whose suit he was in execution, &c. and the Court may make a rule for him to be brought up at the next assizes holden for the place where he is imprisoned. These acts were continued or revived by st. 8 Geo. 2. c. 24., 14 Geo. 2. c. 24., 21 Geo. 2. c. 23., 29 Geo. 2. c. 28, and 32

Geo. 2. c. 28.(a) By s. 13, of the latter, "If any person or persons shall be charged in execution for any sum not exceeding 100*l.*," and shall be minded to deliver up his estate and effects to his creditors, "it shall be lawful for any such prisoner, before the end of the first term next after he shall be charged in execution, to petition any court of law from whence the process issued upon which he was so taken and charged in execution, or the court into which he shall be removed by *habeas corpus*, or shall be charged in custody, and shall remain in the prison thereof," certifying the causes of his imprisonment, and giving a true account of his real and personal estate, and giving notice thereof to his creditors: and if such Court shall be satisfied, the petition shall be received, and they shall give a day to the parties by order or rule of Court to appear personally before them, when the matter of the petition shall be examined in a summary way; and on oath made by the prisoner of his estate and effects, and assignment thereof made by him to his creditors, the Court may discharge the prisoner. But in case any creditor at whose suit he was charged in execution be dissatisfied, the Court may remand the prisoner, and direct him and the dissatisfied creditor to attend on some other day, "some time at furthest within the first week of the term next following, &c., but sooner if any such Court shall so think fit:" after which the Court may discharge the prisoner, unless the creditor shall agree to pay him 2*s.* 4*d.* a-week so long as he shall be continued in execution. But if failure shall be made in the weekly payments, "such prisoner, upon application in term time to the Court where the suit in which he shall be charged in execution was commenced, or shall have been carried on, or in the prison of which court he shall stand committed on any *habeas corpus*, or in vacation time, to any Judge of such court, may, by order of any such Court or Judge, be discharged," &c. It is plain from the terms of this clause, that it was only intended to refer to prisoners charged in execution by process out of the superior courts, or who were removed into the prisons of such courts by *habeas corpus*: and by comparing it with the 15th section, it appears to have been intended to be confined to prisoners in prisons within 20 miles of Westminster-hall; for the 15th section directs, that prisoners "charged in execution in any county gaol, or in any other gaol or prison above 20 miles from Westminster-hall, or the Court out of which the execution shall be issued, &c. or in the prison of which court any such prisoner shall stand charged in execution," shall proceed in like form and manner: and such court may make a rule for bringing him up to the next assizes, &c. On the other hand, the 16th section, which is compulsory on a prisoner to make a disclosure of his estate and effects on the application of a creditor, is relied on as extending in terms to other courts of record than the courts in Westminster-hall; but in that, as in the 11th section, for punishing extortion in gaolers, where the Legislature meant to include inferior jurisdictions, they have said so in terms; whereas having used terms in the 13th section which can only apply to the superior courts, they as plainly evince their intention to exclude all others. And a prisoner in execution under the process of an inferior court is not without remedy, as he may remove himself by *habeas corpus* into the prison of a superior court. He concluded by stating the readiness of the defendants to receive the application if the Court thought they had jurisdiction.

Lord ELLENBOROUGH, C. J. asked the prisoner's counsel, whether the application were at any rate in time, supposing the prisoner had been in custody under the process of a superior court?

Wilson and Pooley, in support of the application, referred to the st. 33 Geo. 3. c. 5, which extends the same relief to debtors for any sum not exceeding 300*l.*; the 5th section of which enacts "that where any such debtor

"shall neglect to take the benefit of the stat. 32 G. 2. c. 28, or of that act within ~~the~~ time limited by that or this act, and shall make it appear to the Court out of which such execution issued that such neglect arose from ignorance or mistake, such debtor shall be entitled to the benefit of the acts," &c. (a) They were then stopped by the Court.

LORD ELLENBOROUGH, C. J. If there be any question upon the sufficiency of the excuse for the delay in not having made the application for relief in time, that must be decided by the Court below upon hearing the ground alleged for the delay. Upon the general question, I observe that the words of the stat. 2 Geo. 2. c. 22, are general, enabling prisoners charged in execution for debts not exceeding a certain amount to petition *any of the courts of law from whence the process issued* to be discharged. This is not contravened by any general provision of the 3 G. 2. c. 27. The st. 8 Geo. 2. c. 24. s. 2, for the first time, introduces the word *term*, as coupled with the general permission given to prisoners to petition *any of the courts of law from whence the process issued*; and that requires the petition to be exhibited "before the end of the *term* next after such person shall be charged in execution;" a limitation which is extraordinary enough, if meant to be applied to inferior jurisdictions, whose proceedings are not regulated by *terms*. But there are other provisions in other acts of parliament upon the same subject, which, it is admitted, must include inferior courts. Then in favour of so beneficial a remedy for the subject we will construe all these acts together, as forming one system of laws, extending to inferior as well as to the superior courts; limiting, however, the application of the prisoner for relief to be made to the court, whether of superior or inferior jurisdiction, out of which the process issues, within the *term* next after he was charged in execution: the st. 8 Geo. 2, using the word *term*, in regard to inferior courts, as if it had required the application to be made within the next three months, or any other given time; the duration of the terms being of general notoriety. Therefore, let the Court below receive the application, and hear what excuse is alleged by the prisoner for not coming in time; and if he should appear to entitle himself to receive the benefit of the act, let them give it to him.

Per Curiam,

Rule absolute.

Ex parte John King, a Bankrupt.

7 East, 91. Nov. 28, 1806.

Mandamus to the Quarter-sessions to inquire and give the benefit of the insolvent debtor's act to a prisoner, if he were entitled to it, denied, where it appeared that he was in execution on the 1st of *January* 1804, for a larger sum than the act extended to; though part of such sum were composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under the commission by a future day not arrived; but which it was stated that he had elected so to prove, and to abandon his judgment before the 1st of *January* 1804, though the prisoner was not discharged by a Judge's order from such execution till long after that day.

THE insolvent debtor's act of the 44 Geo. 3. c. 108, after requiring all gaolers to make out lists of prisoners, who upon the 1st of *January* 1804, or since, and at the time of making out such lists were in their custody for debt, &c. enacts, (sect. 4), "that every person who, on the 1st of *January* 1804, was charged in any prison for the non-payment of debts, &c. which did not on the whole amount to a greater sum than 1500*l.*, and whose name shall be inserted in any such list to be delivered in as aforesaid, taking the oaths

(a) Vide *Pearce v. Taylor*, 4 Term Rep. 231, which arose upon a similar clause in 26 G. 3. c. 44; but both these acts were temporary.

"thereby directed to be taken, and performing what on his part is required to be done, shall be discharged," &c. In *April* 1802, a commission of bankruptcy was taken out against *John King*; and in *Trinity* term 1802, *Pollard* and Co. recovered judgment against the bankrupt, for a debt due before the bankruptcy, and he was thereupon taken in execution for 1152*l.*, the debt and costs: after which *Pollard* and Co. petitioned the Lord Chancellor to be let in to prove their debt under the commission: and on the 7th of *April* 1803, the Lord Chancellor made an order, allowing them time till the first dividend were made to make their election whether they would proceed at law, or under the commission. The Bankrupt now stated in his affidavit that *Pollard* and Co. elected to prove their debt under the commission on the 12th of *December* 1803, (which was long before any dividend made) and signed his certificate,^(a) but he was not discharged out of execution at their suit till the 23d of *January* 1805, when a Judge's order was obtained for that purpose. And on the first of *January* 1804, the bankrupt stood charged in the warden's books for debts to the amount of about 2300*l.*, including the 1152*l.* due to *Pollard* and Co., which, without the latter sum, would have entitled him to the benefit of the insolvent debtor's act. But the Quarter Sessions in *London*, to which he had applied for that purpose, were of opinion, that as he stood charged in the warden's books for more than 1500*l.* on the 1st of *January* 1804, they had no jurisdiction to give him the benefit of the act.

Erskine therefore now applied for a *mandamus* to the Lord Mayor, &c. to inquire whether the bankrupt were in custody on the 1st of *January* 1804 for a larger sum than 1500*l.*: and if not, then to inquire whether he were otherwise entitled to his discharge under the insolvent debtor's act. And he urged that *Pollard* and Co. the creditors might waive the advantage which the Lord Chancellor's order gave them of waiting till the first dividend before they made their election; and that if it appeared to the Court of Quarter Sessions that they did elect to prove their debt under the commission before the 1st of *January* 1804, then the bankrupt was not legally in custody at their suit on that day; their legal debt being then discharged; the same, for this purpose, as if it had been actually paid, though the formal discharge of his person from execution at their suit was not obtained till afterwards: the legal discharge, however, would have relation back to the time of the election made.

LORD ELLENBOROUGH; C. J. Unless there were such a case made, as we could plainly see that the debt with which the prisoner stood charged on the 1st of *January* 1804 was unfounded and false, we cannot extend the benefit of the act to him. But on the contrary, it appears, that long after that time he was actually indebted in, and stood charged in execution for a larger sum than that limited for the relief of the act: and therefore it would be nugatory to grant the writ prayed for.

Per Curiam,

Rule refused.

(a) The majority of the commissioners, however, refused to certify to the Lord Chancellor the bankrupt's conformity to the acts; and after an unsuccessful application to the Lord Chancellor for this purpose, *Plowden* applied in this term, on behalf of the bankrupt, for a *mandamus* to the commissioners to sign such certificate, upon a long affidavit setting forth many special circumstances. But the court were of opinion, that the Legislature had vested a discretion in the commissioners to judge of the bankrupt's conformity or nonconformity, with which discretion they could not interfere; and therefore refused the writ.

Bradshaw v. Saddington.

7 East, 94. Nov. 28, 1805.

An affidavit to hold to bail, stating that the defendant was "justly indebted to the plaintiff in 100*l*. upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee.

AN affidavit to hold the defendant to bail stated, that he was "justly and truly indebted to the plaintiff in the sum of 100*l*. and upwards, upon and by virtue of a certain bill of exchange drawn by the said defendant, and long since due and unpaid." For the insufficiency of which

Lawes obtained a rule *nisi* to discharge the defendant out of custody on filing common bail; because it was not stated in what character, whether as payee or indorsee, the plaintiff charged the defendant to be indebted to him; so that no privity appeared between the plaintiff and the bill, which he said was as necessary to be stated, as in any case to shew on what account the defendant became indebted to the plaintiff; and that it was usual for affidavits to hold to bail on bills of exchange to state that the plaintiff was *payee* or *indorsee*, &c.

Espinasse shewed cause, and observed that the affidavit stated the bill to have been *drawn* by the defendant, and therefore he could only be indebted to the plaintiff *upon it* as payee or indorsee. That in *Coppinger v. Beaton*, 8 Term Rep. 338, it was holden sufficient for the affidavit to state that the defendant was indebted to the plaintiff in such a sum "for money had and received on account of the plaintiff," without saying, "received *by the defendant*."

The Court said, that the affidavit sufficiently indicated the ground on which the plaintiff had holden the defendant to bail; that it was upon a bill of exchange drawn by the defendant, on which he was justly *indebted* to the plaintiff; and it was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee, he claimed: if he had no interest in the bill on which he could sue the defendant, he would be guilty of perjury, and would be liable to an action for maliciously holding the defendant to bail. The object of requiring an affidavit of the debt, in order to hold a defendant to bail, was to prevent any person being holden to bail for a larger sum than was due, and therefore it is properly required that the cause of action shall be stated; but this is sufficiently particular to give the defendant notice on what account he is sued.

Rule discharged.

CASES

IN

HILARY TERM,

IN THE FORTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

Trent, Widow, and Others v. Hanning, and Others.

7 East, 97. Jan. 7, 1805.

Under a devise to the testator's widow of "200*l.* per annum for life, in addition to her jointure," (which jointure it appeared was secured by a term out of his real estates,) "his debts being previously paid; and to his younger children 6000*l.* each, to be paid respectively at 21:" after which the testator "appointed *A. B.* and *C.* as trustees of inheritance for the execution thereof:" held by three Judges, that the trustees thereby took a fee in the testator's lands; against one Judge, who thought the meaning of those words too uncertain to disinherit the heir at law.

THE following case was sent by the Master of the Rolls for the opinion of this Court.

John Trent, being seised in fee of certain plantations and premises in the island of *Barbadoes*, in contemplation of a marriage between him and *Eliza Phipps*, which soon afterwards took effect, by indentures of lease and release, dated the 29th and 30th of *October* 1792, bargained, sold, aliened, released, and confirmed the said plantation and premises to *S. Estwick*, to hold to him, his heirs and assigns, to the use of the said *John Trent* till the marriage, remainder to the use of the said *John Trent* for life, without impeachment of waste, remainder in trust to secure an annuity of 500*l.* a-year for her life to the said *Eliza Phipps*, in lieu of dower, remainder to trustees for 200 years, for better securing the payment of the said annuity, remainder to *John Trent* in fee. *John Trent*, on the 5th of *August* 1796, by his will, (duly executed and attested,) devised as follows: "I *John Trent* do hereby give unto my wife 200*l.* per annum during her natural life, in addition to her jointure, my just debts being previously paid; and I do give unto my two younger children 6000*l.* each to be paid when they severally come to the age of twenty-one: and I do appoint *J. Hanning*, *W. Hanning*, and *C. Phipps*, as Trustees of Inheritance for the execution hereof." *John Trent* afterwards died without revoking or altering his said will, leaving his widow, the two younger children mentioned in his will, and a child born afterwards, to whom he gave 6000*l.* by a codicil, him surviving. *C. Phipps* survived *John Trent*, but is since dead. The questions for the opinion of the court were, 1st, Whether *J. Hanning*, *W. Hanning* and *C. Phipps* took any and what estate or interest in the real estates of the said *John Trent*, under and by virtue of his will? or, 2dly, Whether they had, by virtue of such will, a power to make any conveyance or appointment of any and what estate or interest of or in

such real estates? And if they had, 3dly, Whether such power survived to *J. Hanning*, and *Wm. Hanning*? This case was argued in *Easter* term last, when

Peake for the plaintiff, upon the first question, contended, that the trustees took a fee in all the real estates of the devisor. Admitting that the heir at law can only be disinherited by express words, or necessary implication: yet if the court see plainly that the devisor's intention was to dispose of or charge his real estates, they will give effect to it, though not technically expressed. Here his intention plainly was to provide for the payment of his debts, for his widow, and for his younger children, (his eldest son being otherwise provided for,) out of his real property. For this purpose his will is executed and attested as required by law for charging real property. He gives his wife 2000*l.* per annum in addition to her jointure; which jointure being secured out of lands, his coupling the two together seems as if he contemplated the same security: and then he appoints three persons "trustees of inheritance" for the execution of his will. This must mean trustees of something which could be inherited, and that could only be land; the term is inapplicable to personal property: it must mean too a descendible interest in land, something which was the proper subject of devise to the trustees and their heirs till the purposes of trust were completed. This would give the trustees a fee. Besides, many cases have occurred where trustees have been holden to take a fee, it appearing to be necessary for the purposes of the trust, though not expressly devised to them. In *Gibson v. Lord Mountford*, 1 Ves. 491, Lord Hardwicke states that as an established rule. [Lord Ellenborough. To be sure trustees must in all cases be presumed to take an estate commensurate with the charges or duties imposed upon them.] The very appointment implies a duty to raise the money for the debts and portions, and to pay the annuity; and the law implies such an estate or interest as will enable them to do these things. The term trustees is known to the law, as persons in whom the legal estate is vested; and these persons are expressly appointed trustees for the purposes of the will. In *Oates d. Markham v. Cooke*, 3 Burr. 1684, and vide *Shaw v. Weigh*, 2 Stra. 798, where the testator, after giving several small annuities, some for life, others in fee, one of which annuities for life was directed to be paid by his trustee or executor, then directed "these legacies to be paid by his trustee *J. Cooke* every year," &c.; this was holden to pass the fee by necessary implication to the trustee, though there were no words of inheritance or technical terms to pass the estate; and that was the stronger, because an annual sum was left to the Trustee, out of the yearly rents, for repairs, &c. In *Taylor v. Webb*, Styl. 301. 307. 319, the devise was thus, "I do make my cousin *G. B.* my sole heir and my executor," which was deemed to pass the fee simple(a) of the devisor's lands to *G. B.*, being the same as if the devisor had made *G. B.* "heir of his lands." In that case, nothing was said of the devisor's lands; but it was considered that by designating *G. B.* as his heir, the devisor shewed an intention that *G. B.* should have his lands, as the law would have given them to his heir. Now, here the words "Trustees of inheritance" cannot relate to any thing but the devisor's lands; as if he had said trustees or devisees of the inheritance for the purposes of the will. A devise of my inheritance will pass the fee, *Widlake v. Harding*, Hob. 2. 2dly, If the legal estate be not vested in the trustees, at least they have a power to raise the legacies out of the land. Though there should be no cases noticed in the books of powers raised without express words, yet if the court see such an intention, they will give the power necessary to carry the will into effect. When therefore the testator, after directing certain legacies to be paid, appoints these persons "trustees of inheritance for the execution thereof," he must necessarily have intended that they should

(a) This appears from *Marret v. Sly*, 2 Sid. 75.

have some fund out of which to raise the money, and that they *should* raise the money at the appointed time. That fund is *the inheritance*, i. e. the *land* of the testator: and they must have such a disposing power over the *land* as is necessary for the purposes required, that is, by sale, *Long v. Long*, 5 Ves. jun. 445, or mortgage. 3dly, Though it be only a power, yet the two surviving trustees may execute it. The general rule is, that all those who are named must join in the execution of a bare power, not coupled with an interest: but *Lock v. Loggin*, 1 And. 145, takes the distinction, which is recognized in other cases^(a), that if the testator devise generally that his *executors* shall do an act, and then appoint three, and one die, the survivors shall do it: in these cases it seems to be now considered that the power is annexed to the *office*, and not to the persons. Now, in this case, by adding the words "*of inheritance*" to the general description of *trustees*, the testator must have intended that their *heirs* should have the same as themselves, and consequently the power would survive and descend to the heirs of the survivor.

Moore, contra. An heir at law can only be disinherited by express words or necessary implication; but no necessity exists here for raising an implication of such an intention: the words themselves do not import it: and it cannot be collected from the mere circumstance of having three witnesses to the will, which might be merely accidental. The testator does not appoint the defendants *trustees*, but *as* trustees, &c.; and not "*trustees of his inheritance*," but only "*trustees of inheritance*;" leaving it very doubtful from the very ambiguity of the expression, whether he knew the legal import of the word *inheritance*. He might have considered it as comprising personality, as it does in the civil law, vide Styl. 319: or he might have meant to appoint these persons and *their heirs* to be his trustees till the purposes of the will were answered; which would not pass the fee to them. In *Oates v. Cooke*, 3 Burr. 1684, not only the legacies were to be paid *by the trustee*, but *he and his heirs* were to see that the testator's tomb was kept in order: which could not be satisfied without giving the trustee a fund sufficient for these purposes. And in *Doe v. Snelling*, 5 East, 87, this distinction was recently taken, that if there be a personal charge on an executor or trustee in respect of the realty, it passes the fee. But here is no personal charge on these trustees. In *Taylor v. Webb*, Styl. 319, Lord C. J. Rolle said, that they might collect the testator's intention to be, by making the party *his heir*, that he should have his lands: and that it was all one as if he had said "*heir of his lands*:" particularly, as in that case he had made the party his *executor* also, which gave him his goods; and therefore if he had not his lands, the word *heir* would be merely nugatory. There too the devisee had annuities to pay, Styl. 301. 308: which alone was sufficient to carry the fee; and the testator directed him where to find the conveyances and assurances of his lands, Styl. 308. And in the subsequent case of *Marret v. Sly*, 2 Sid. 75, the Court considered that the testator's intention to pass his lands plainly appeared. Then as to any intention to secure the widow's annuity of 200*l.* on his lands by declaring it to be *in addition to her jointure*, which was so secured, upon the presumption that the security was to be *ejusdem generis*; he must have intended to raise a term such as that on which the jointure was secured: but how can such a construction be made on the words of this will; and what duration shall be given to the term? At any rate, it cannot shew that the testator meant these persons to take a fee. It is rather to be collected from the words of the will, that he meant the *annuity* to be paid out of the *same* fund as the debts, which are to be *previously* paid: and these must of course be paid out of the personality, unless there be a manifest intent to charge the realty, which none of the words naturally import: and *non constat* but that

(a) Several others were mentioned, but Lord *Ellenborough* observed, that they were all collected in Mr. *Hargrave's* notes in Co. Litt. 113, 114. b.

the personalty may have been sufficient for both purposes. He then referred to the rule laid down by Lord C. J. *Vaughan*, in *Gardner v. Sheldon*, *Vaugh.* 262, who takes this difference concerning estates that pass by implication in a will; that "an estate given by implication of a will, if it be to the disinheriting of the heir at law, is not good, if such implication be only *constructive and possible*, but not a *necessary* implication. I mean, says he, by a *possible implication*, when it may be intended that the testator did purpose and had an intention to devise his lands to A.; but it may also be as reasonably intended that he had no such purpose to devise it to A. But I call that a devise by *necessary implication* to A., when A. must have the thing devised, or none else can have it." [*Lawrence, J.* That rule is narrowed by *Ld. C. J. Willes*(a) to this, "that the intent of the testator ought to appear plainly in the will itself, otherwise the heir shall not be disinherited."] Here there is no such plain intent. 2dly, As to this being a power to raise money; no intention of creating a power appears from the words of the will; nothing is said of any act to be done, such as to sell, to mortgage, &c.; and there is no instance of implying a power. Where indeed trusts are created, and no person is appointed to execute them, the Court of Chancery will direct their execution under its own controul; but this Court have no jurisdiction to consider that. Besides, the words of the will are inconsistent as to the nature and extent of the power to be implied; for if the term *inheritance*, as here used, shew an intention to charge the portions on the land, it must give the trustees a *fee simple*; but the jointure being secured only by a *term*, which is not a security of inheritance, the addition of the 200*l.* a-year to the widow could only be meant to be secured in the same manner. 3dly, As to the survivorship, a naked power, such as this must be, if any, has never been holden to survive, unless where given to *executors* generally, who take as it were *virtute officii*. The cases are collected in *Co. Lit.* 113. *a*. But the exception does not extend to *trustees*, who have no powers necessarily incident to them by law; but only such as are given to them by those who create the trusts. Even as to executors who are named, the only cases cited in the note to *Co. Lit.* 113. *a*. in favour of the power surviving are *Keilw.* 44, and 2 *Brownlow*, 194: but they were merely *dicta*. The first was in the 17 H. 7, and is contradicted in the Year-book 19 H. 8. fo. 9, 10, 11: the other was only the *dictum* of *Winch*, in the 10 Jac. 1, nearly twenty years before the publication of *Co. Lit.*, and has the subsequent authority of Lord *Coke* against it in his comment on sect. 169, of *Littleton*, who says the law was, that if one executor refused to sell, the others could not sell till the stat. 21 H. 8. c. 4,(b): and in *Yates v. Compton*, 2 P. Wms. 308, which is the latest case referred to, Lord *King* decreed that the *heir* should join in the sale.

Peake, in reply, said, that no other meaning had been attempted to be given to the words of the will than what he had contended for; and unless they would bear that construction, the will would be waste paper. And he observed, (though it was not stated in the case,) that the personal estate was deficient for the purposes of the will, which had given rise to the present question. As instances of estates raised by implication in favour of persons to whom there was no express devise, he cited *Willis v. Lucas*, 1 P. Wms. 472, & vide *Walter v. Drew*, *Com. Rep.* 372, and other cases there referred to. And as to the distinction contended for between a power given to executors by name and to executors generally, that the latter only should survive; that was sufficient for the present purpose, where the persons named in the will were appointed *trustees of inheritance* generally for the execution of the will. And it was sufficient in *Yates v. Compton* to make the heir join in the sale for the satisfaction of a purchaser; but no opinion was given on the necessity of it.

(a) *Moore v. Heaseman*, *Willes*, 141, and vide the same opinion delivered by *Ld. C. J. Willes* in *Roe d. Fulham v. Wickett*, *ibid.* 309.

(b) Sed vide Lord *Kenyon's* opinion in *Withnell v. Gartham*, 6 *Term Rep.* 396.

The Court said, that they would look into the cases, and certify their opinions.

On the 18th of *December* Lord *Ellenborough*, C. J. and *Grose* and *Le Blanc*, Justices, certified as follows:

We have heard this case argued; we have considered it; and it appears to us, attending to the whole of the will, that the testator *John Trent*, in appointing *John Hanning*, *William Hanning*, and *Constantine Phipps*, as trustees of inheritance for the execution of his will, plainly meant to make them trustees of his estates of inheritance, in the same manner as if he had used the words "trustees of *my* inheritance," or "trustees to inherit *my* said estates for the execution of this *my* will." We are therefore of opinion that *John Hanning*, *William Hanning*, and *Constantine Phipps* took an estate in fee in remainder in the said real estates of the said *John Trent*, subject to the term of 200 years created by the settlement.

ELLENBOROUGH.
N. GROSE.
S. LE BLANC.

LAWRENCE, J. certified as follows.

The rule of law being, that the intent of a testator to disinherit his heir at law must be clear and plainly appear in his will, otherwise his heir *shall* not be disinherited, the questions submitted to the consideration of the Court depend upon this, viz. Whether such intent do so appear? And I do not think it does. For the testator has not made any mention whatsoever of his lands, nor has he in any manner referred to them: the addition to his wife's jointure is not charged upon them; and that part of his will may be well satisfied if the personal estate be the fund for paying it. The giving his wife 200*l.*, in addition to her jointure, is but giving her that sum over and above the jointure; and it will not be less an addition to it if it be payable from a different fund. The legacies to the children are given in terms as general as possible. And the principal ground on which it has been contended that the testator devised his *lands* for the payment of them is furnished by that part of the will which appoints certain persons to be "*trustees of inheritance* for the execution thereof;" which expression, though it may furnish ground to conjecture that the testator meant that they should take his real estate, to enable them to execute his will, is, I think, too uncertain to pass such estate. The use of any expression made so inaccurately as it cannot but be admitted this has been, without any circumstance to fix such its sense and meaning, and that by a person ignorant of legal forms, as the testator appears to have been, will not in my opinion enable the Court to say, that it must be understood with reference to his real estates. *Inheritance* might be supposed by the testator to be more generally applicable to things *personal* than it is when properly used; or that the mode in which things real and personal are transmitted to those, who as the representatives of their owners are entitled to them on their deaths, was an acquisition by *inheritance* as much in one case as in the other: he might suppose that things personal would actually descend to an heir; or he might mean by the expression he has used, to point out those who should succeed to the trusts on the deaths of the persons whom he had named in his will, and that in their heirs those funds should be vested, which, without any charge on his real estate, would be applicable to satisfy the bequests to his wife and children. And I think it would be going much beyond any of the cases which are to be found in our books to hold that this in any way affects the real estates of the testator. I am therefore of opinion, that *John Hanning*, *William Hanning*, and *Constantine Phipps* did not take any estate or interest in the real estates of the said *John Trent*, and that they had not by virtue of his will a power to make any conveyance or appointment of any estate or interest of or in such real estates.

S. LAWRENCE.

Spenceley, qui tam, &c. v. De Willott.

7 East, 108. Jan. 27, 1806.

A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue; for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony.

AT the trial of this action for usury before Lord *Ellenborough*, C. J. at the sittings after last term at *Westminster*, wherein the usury was alleged to have been committed by the defendant in a contract made by him with the *French Marquis de Chambonas*, the plaintiff's case was proved by the Marquis, who, on his examination in chief, swore, in substance, that the defendant had advanced to him the sums of money mentioned in the declaration, at the rate of about 10*l.* per cent. per month, and not by way of partnership: and there was no question of the usury, if the Marquis were believed. But the defendant's counsel intending to discredit the witness, on cross-examination proposed to ask him what contract he had made with a Mr. *Schullenburg*, and with several other third persons from whom he had also taken up money, on the same and on other days on which the contract in question was made; and this, for the purpose of drawing from the witness the confession that he had taken up sums of money from those third persons on terms of confidence that he was to employ the money so raised according to his own discretion, (which he had suggested to them he was enabled to do to great advantage,) and to share with them the profits whatever they might be: the defendant's counsel intending, if the witness answered in the affirmative, to draw from thence a conclusion that he had made the same contract with the defendant, (which was suggested to be the fact) with whom as with those third persons he was living at the time in habits of frequent communication and familiarity: or if the witness denied that such was the nature of his dealings with those persons, to call Mr. *Schullenburg* and the others to prove the contrary, and thereby destroy the witness's credit. Lord *Ellenborough*, however, refused to suffer the question to be put to the witness on his cross-examination, conceiving it to be entirely irrelevant to the issue in the cause; and that it was not allowable for a counsel on cross-examination to put to a witness any question concerning a distinct collateral fact not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses. The plaintiff having obtained a verdict for 25,200*l.*,

Erskine now moved for a new trial, first, on the ground of the rejection of the evidence proposed to be obtained upon the cross-examination of the witness; and 2dly, upon an affidavit that the plaintiff had published a statement of the case, which was distributed about the court and the hall before and at the time of the trial. On the first ground he reasoned generally upon the inconvenience and danger to truth and justice if a witness, perhaps unknown, who swore to a fact stated by him to have passed in secret or confidence with a party to the suit, when no other witness was present with whom he could be confronted, could not have his credit tried by a cross-examination as to collateral matters, whereon, if he spoke falsely, the falsity was capable of being shewn by other witnesses. That this was of peculiar importance in criminal cases, where a person unjustly accused of secret offences could often have no other means of defending himself. But

The Court were all decidedly of opinion that it was not competent to counsel on cross-examination to question the witness concerning a fact wholly irrelevant to the matter in issue, if answered affirmatively, for the purpose of discrediting him if he answered in the negative by calling other witnesses to disprove what he said. That in this case, whatever contracts the witness might have entered into with other persons for other loans, they could not be

evidence of the contract made with the defendant, unless the witness had first said that he had made the same contract with the defendant as he had made with those persons; which he had not said. They observed, that the rule had been laid down again and again, that upon cross-examination to try the credit of a witness only general questions could be put, and he could not be asked as to any collateral and independent fact merely with a view to contradict him afterwards by calling another witness. The danger of such a practice would be obvious; besides the inconvenience of trying as many collateral issues as one of the parties chose to introduce; and which the other could not be prepared to meet. *Ld. Ellenborough* added, that he had ruled this point again and again at the Sittings till he was quite tired of the agitation of the question; and therefore he wished that a bill of exceptions should be tendered by any party who was dissatisfied with his judgment, that the question might be finally put at rest.⁽¹⁾ And the Court desired to have it understood, that they rejected the motion for a new trial on the first ground, and granted a rule nisi on the second ground alone, upon the affidavit of the publication and distribution of the plaintiff's statement of his case at the trial.⁽²⁾

Salt, One, &c. v. Richards and Others, in Error.

7 East, 111. Jan. 27, 1806.

No costs are allowed on the stat. 3 H. 7. c. 10, where a writ of Error is non prossed before the transcript of the record by the clerk of the Errors of B. R.

DAMPIER moved that the defendants in error might have their costs of the non pros of the writ of error, (which writ of error was non prossed for not transcribing the record,) to be taxed by The defendants in error brought their original action on the case in this court against the plaintiff in error, who let judgment go by default, and final judgment thereon was signed on the 11th of July 1805; and on the 5th of July, before execution, he brought his writ of error in the Exchequer Chamber, directed to the Lord Ch. J. of this Court, in *Michaelmas* term last. On the 26th of November, judgment of non pros was signed by the clerk of the errors in this cause for not transcribing. Two questions were made, 1st, Whether the defendants in error were entitled at all to the costs of such non pros; and if they were, 2dly, by whom such costs were to be taxed? 1st, It appears that costs are given in this case by the stat. 3 H. 7. c. 10, which reciting that plaintiffs or demandants that have judgment to recover were often delayed of execution by the defendants or tenants suing writs of error for delay, enacts, "that if such defendant or tenant, &c. sue, afore execution had, any writ of error to reverse any such judgment, in delaying of execution, then if the said judgment be affirmed good in the said writ of error, or that the said writ of error be discontinued, &c. or non prossed; then the person against whom the said writ of error is sued shall recover his costs and damage for his delay and wrongful vexation in the same by discretion of the justice afore whom the said writ of error is sued." The writ of error is an original writ, issued out of Chancery, (a) directed to the Lord Chief Justice of this Court, commanding him to certify the record and all things concerning the said

(1) The rule as laid down by *LAWRENCE, J.* at nisi prius, in a later case, is, that you may put questions to a witness on cross-examination as to any improper conduct of which he may have been guilty, for the purpose of trying his credit; but when those questions are irrelevant to the issue on the record, you cannot call other witnesses to contradict the answers he gives. *Harris v. Tippett*, 2 Campb. 637.

(2) [See *Rex v. Watson*, 2 Stark. N. P. C. 116, 157. *Griffith v. Eshelman*, 4 W. 64.—W.]

(a) Vide stat. 27 Eliz. c. 8.

judgment into the Exchequer-chamber, to be there examined by the justices of the Common Bench and Barons of the Exchequer. The writ of error is then allowed (a) by the clerk of the errors (b) in this court, who keeps it in the error office; and when it is returnable the defendant in error, in order to quicken the plaintiff's proceedings, serves him with a rule to transcribe, i. e. to certify the record within eight days, or otherwise that a nonsuit will be entered; which rule is given also by the clerk of the errors in this court, who does not however prepare the transcript till he receives the money. If the transcript money be paid in time, the cause proceeds in the court of error: but if it be not paid, the clerk of the errors, at the end of the eight days, having given another rule or notice (c) to the plaintiff in error, that unless the transcript money, amounting to so much, be paid by such an hour on the morrow, a *non pros* will be entered, signs judgment of *non pros* in a book kept in his office for that purpose. Now it could not have been the meaning of the statute of Hen. 7, that the defendant in error, to whom the costs of a *non pros* are given, should lose those costs because of the default of the plaintiff in error in not procuring a transcript of the record; and it is clear that till the transcript be sent out of this court into the Exchequer Chamber, that court can have no knowledge of the matter. It follows, therefore, that in order to prevent a failure of justice, this court must have the power of awarding those costs before the transcript made and certified, which the court of error would have awarded in course if the writ of error had been non proseed after the transcript made and certified. The words of the statute are large enough to admit of this construction; for it directs that the defendant in error shall recover his costs "by discretion of the justice afore whom the said writ of error is sued." By the justice must be meant the court; and before the transcript be certified to the court of error, the writ of error, which is in the custody of the officer of this court who rules the parties, may be said to be sued before this court. Then, 2dly, though the Master of this court be the general officer of it for taxing costs in civil suits; yet there is no instance of his having taxed costs in error under these circumstances; for this reason, that he has no documents whereon to found his taxation: for before the transcript goes over to the clerk of the errors in the Exchequer Chamber the documents are with the clerk of the errors of this court: it follows therefore that the taxation, if it can be made at all, must be made by this latter officer. But he admitted that there was no instance of any taxation in such a case, which he attributed to the small amount of the costs before any transcript made.

Comyn, contra, agreed that "the justice" meant "the court afore whom the writ of error was sued;" but contended, that this was a *casus omissus* in the act 3 H. 7. c. 10, and not supplied by any other statute; and that at common law no costs in error were allowed. The court "afore whom the writ of error is sued" must either mean the court of Chancery, out of which the writ issues, or the Exchequer Chamber, into which the record is to be removed by means of it; but in no construction can it mean the court whose judgment is to be reviewed. It is admitted that there is no precedent of any taxation of costs on the *non pros* of a writ of error for not transcribing; and that neither the Master of this court, nor the clerk of the errors in the Exchequer Chamber, who are the proper officers for taxing costs in the respective courts, have any documents before them for making the taxation in question; which furnishes a fair presumption that no costs are allowable in such a case, within the act of parliament: and so the practice is stated to be in Tidd, 2 Vol. 1125. 2d edit., who cites 2 Term Rep. 17, and Law and Prac-

(a) Vide 2 Tidd's Pract. 1099, 2d edit.

(b) This is an officer appointed by the Lord Chief Justice of this Court.

(c) This is called the transcript note.

tice of Error, 31. The stat. 4 Ann. c. 16. s. 25, in part supplies the defects of the former statute by giving costs on quashing writs of error, but does not supply the defect in the present case.

Lord ELLENBOROUGH, C. J. It cannot be said, that there is any failure of justice if the costs be not taxed in this case, where it does not appear that the statute 3 H. 7, meant that they should be taxed. That statute says, that the defendant in error shall recover his costs and damage "by the discretion of the justice afore whom the writ of error is sued." Now taking for granted that *the justice* there spoken of means *the Court*, yet by "*the court afore whom the writ of error is sued*" can never be meant the court to whom the error is imputed. It must mean either the court of Chancery, out of which the writ of error issues, or the Exchequer Chamber, which is to review the erroneous judgment. But at any rate, this court cannot be the proper forum to tax the costs, whatever other court, if any, were intended to do so. But I rather incline to think that the legislature did not mean to give costs in this case, because there is no court, properly speaking, before whom the writ of error is sued, without the transcript being certified to them. And the universal practice not to tax costs in this case confirms that construction.

The other judges concurred: *Grose* and *Lawrence*, Js. adding, that "*the court afore whom the writ of error is sued*" must mean the court of Exchequer Chamber, to whom the record was transferred, and who were to review the error imputed. And *Le Blanc*, J. saying, that the legislature did not appear to have contemplated the costs which might grow before the return of the writ of error.

Rule refused.

Rhodes v. Bullard.

7 East, 116. Jan. 28, 1806.

The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself, *whilst the same should remain there*, paying half the expences of repair." The words *whilst, &c.* reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump.

IN covenant, the plaintiff declared upon an indenture whereby the defendant demised to the plaintiff all that part of a certain messuage or tenement which then had been lately parted off by the defendant from the part occupied by himself, consisting of a kitchen, wash-house, (and other rooms specified,) and also a warehouse behind the said messuage, and also all that part of the yard belonging to the said messuage between that and the warehouse (setting it out according to measure), with all ways, waters, easements, &c. appertaining to the same, *habendum* to the plaintiff from the 25th of Dec. 1795 for a term of 21 years, at a certain rent, &c. And the defendant covenanted that *during the said term* (inter alia) he would permit the plaintiff to have free ingress, egress, and regress through the gate at the bottom of the yard belonging to the said messuage and premises to the said warehouse, *and the use of the pump in the said yard jointly with the defendant* *WHILST THE SAME SHOULD REMAIN THERE, paying half the expences of keeping it in repair.* And then the defendant, after averring his entry into and possession of the premises under the said indenture, and performance of the covenants on his part, assigned for breaches, 1st, "that during the continuance of the lease the defendant did not permit him to have the use of the said pump in the said yard jointly with the defendant *whilst the same remained there, paying half the expence of keeping it in repair*; but, on the contrary, whilst the said

pump remained in the said yard, the defendant wrongfully and injuriously prevented the plaintiff from the use of the said pump: and, 2dly, That the defendant *unnecessarily and without any reasonable cause, and in order to aggrieve and injure the plaintiff, removed and took away the said pump*, contrary to the form and effect of the said indenture; although the same would otherwise have remained there for the purpose in the said indenture mentioned, and although the plaintiff was always and is ready and willing to pay half the expence of keeping the same in repair; whereby, and not from any want of repairs or decay of the said pump, or any necessity, but that the same might and otherwise would have remained there, the plaintiff lost the use of the same and the profit and benefit thereof, &c. The defendant, by his plea, took issue on the first breach assigned, and demurred generally to the second breach.

Abbott, in support of the demurrer, contended that the words, "*whilst the same should remain there*," made it optional in the defendant to keep or to remove the pump at his pleasure; and then the allegations, that it was removed *without reasonable cause, and in order to injure the plaintiff*, were mere aggravations, and could not amount to a breach of covenant. He observed that there was no demise of the pump, and therefore the cases which shew that a party cannot defeat his own grant do not apply. And that this construction was not inconsistent with the undertaking of the plaintiff to pay half the expences of repair, because that was no more than a consideration for the use of it so long as the defendant found it convenient to let it remain there; and it was competent to him to impose that condition while it remained, without relinquishing his option to remove it. The contrary construction requires the words "*whilst the same should remain there*" to be rejected.

Wigley, contra. The meaning of a covenant is to be gathered from the plain natural sense of the words, and needs no technical terms to express it; and the covenant by the defendant to pay for half the repairs shews that both parties contemplated that the pump should remain there during the term; or at least that the defendant should not wilfully remove it. There is no occasion to reject the words "*whilst the same should remain there*;" but the Court will give them such a construction as is consistent with the rest of the covenant and the apparent intention of the parties; and that may be done by considering them to mean "*whilst the same should remain there without any default of the defendant in voluntarily removing it*." If therefore it were destroyed by fire or other accident during the term, that would have been an excuse: and the defendant would not have been bound to *renew* it, though he was bound to *repair* it whilst it was capable of repair. According to the defendant's construction he might have called on the plaintiff to pay half the expence of the repairs one day, and have removed it the next, which could not have been intended by the parties. And he cited *Griffith v. Goodhand*, T. Raym. 464, *Cole's case*, Salk. 196, and *Hollis v. Carr*, 2 Mod. 86.

Lord ELLENBOROUGH, C. J. The question turns on the meaning of a covenant in the lease whereby certain parts of a messuage, then lately parted off from the part occupied by the defendant, were leased by him to the plaintiff, with certain easements belonging to the same, for a term of 21 years. The pump, it is to be observed, is not a specific subject of the demise. Then follows a covenant by the defendant that he will during the term permit the plaintiff to have free ingress, &c. through the gate in the yard, and "the use of the pump in the yard, *whilst the same should remain there*, paying half the expences of keeping it in repair." If the words "*whilst the same should remain there*" had not been introduced, I should have thought the covenant meant to secure to the plaintiff the continual use of the pump during the term, and that the lessor would have been guilty of a breach of covenant by wilfully removing it. But this covenant, unlike the covenant for free ingress and egress through the yard, is qualified with the words *whilst*, &c.; and the

question is, Whether by the introduction of those words the lessor did not mean to reserve to himself a power of removing the pump whatever might be his motive for doing so. And can we strike out words which are capable of a sensible meaning? Now taking the whole together, the meaning of the words will stand thus: the lessor says, I demise to you a certain part of a messuage, with certain easements, for a term; and during the term you, the lessee, shall have a free passage through a certain gate in the yard, and you shall, as long as I think proper to let the pump remain in the yard, have the use of it, you paying half the expence of repairing it; but I will not bind myself to continue it there, but reserve to myself an option, whether from choosing not to be at any expence, or from whatever other motive, to remove it when I please. I can give no other meaning to the words, *whilst, &c.* If those words had not been introduced I should have thought, according to the case of *Pomfret v. Ricraft*, 1 Saund. 321, that the demise of the use of the thing was a demise of the thing itself, and that it must have been intended that the parties meant that the pump should remain there during the whole term: but by the introduction of those words it appears that the lessor meant to reserve to himself the liberty of removing it, from whatever capricious or unreasonable motive he might do so; and consequently the breach is ill assigned.

GROSE, J. It is material to consider that there are no words of demise of the use of the pump; but the lessor, in a subsequent part of the lease, covenants that the lessee shall have the use of the pump jointly with himself, *whilst the same should remain there, &c.*; the fair construction of which is, that it should be in the lessor's option how long it should remain there; and that is not inconsistent with the stipulation that the lessee should pay half the expences of repair whilst it did remain there.

LAWRENCE, J. inclined to think that this was the true construction of the words of the covenant, though he doubted whether the parties had really so intended. He rather thought that they meant to have said what the plaintiff's counsel had contended for; but they had not used words to express such intention.

LE BLANC, J. The parties probably meant to say no more than this, that as long as the lessor kept the pump in repair the lessee should have the use of it, he paying to the lessor half the expences of repair. And if the words had stopped there, the lessor could not have taken it away. But the only meaning of adding the other words, "*whilst the same should remain there,*" must have been to reserve to the lessor the option of removing it.

Judgment for the Defendant.

Lady Wilson v. Sir Francis Willes, Knt.

7 East, 121. Jan. 28, 1806.

A custom, that all the customary tenants of a manor *having gardens, parcels* of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor to be used upon their said customary tenements, *for the purpose of making and repairing grass-plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, at all times of the year, as often and in such quantity as occasion hath required,* is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences* of such customary tenements.

TRESPASS for breaking and entering the close of the plaintiff, called *Hampstead Heath*, in the parish of *St. John, Hampstead*, in *Middlesex*, and

digging certain turf, of the plaintiff there being, viz. 100 square yards of the plaintiff's turf then covered with grass, and fit for the pasture of cattle, of 20*l*. value, and carrying away and converting it to the defendant's use. Plea 1. Not guilty of the force, &c.; and as to the residue of the trespass, that the *locus in quo* is, and at the said time when, &c. was, and from time immemorial has been, a certain large waste situate within and parcel of the manor of *Hampstead*, in *Middlesex*, within which manor there have immemorially been divers customary tenements demised and demisable by copy of court rolls, &c. in fee simple or otherwise, at the will of the lord, according to the custom of the manor; and that within the manor there has immemorially been an ancient custom, that all and every the customary tenants for the time being respectively of all and every the aforesaid customary tenements *having a garden or gardens parcel of the same*, have immemorially dug, taken, and carried away, and have been used and accustomed to dig, &c. in, upon, and from the said close, in which, &c. *by themselves and their farmers and tenants respectively, occupiers of such customary tenements* with the appurtenances respectively for the time being, *for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent, every year, at all times in the year, as often, and in such quantity as occasion hath required*, as to their said customary tenements with the appurtenances respectively belonging and appertaining. The plea then stated a grant from the Lord of one of the aforesaid customary tenements, consisting of a certain messuage and garden, &c. parcel of the manor, to the defendant, his heirs, &c. at the will of the lord, &c. by virtue of which he entered, and was seized, &c.; and that being so seized, &c. at the said times when, &c., being times *when occasion required*, he entered into the *locus in quo* in order to dig, take, and carry away, and did then and there dig, take, and carry away the said turf in the declaration mentioned, the same being then found in and upon the said close to be, and which afterwards was used and spent in and upon his said customary tenement, &c. for the purpose of making *two grass plots* in the said garden, parcel of the same as aforesaid, *for the improvement thereof*; the same turf being then and there fit and proper to be so used and spent, and being *such quantity as the occasion required*, as he lawfully might for the cause aforesaid, &c. The 2d special plea alleged more generally the same right in the customary tenants to dig, take, and carry away the turf to be used and spent in and upon their customary tenements, &c. *in and for the improvement of the gardens, parcels of the same* respectively; without confining the improvement to the making and repairing of *grass plots* therein. The 3d special plea alleged a similar right in the customary tenants to dig, take, and carry away, to be used and spent in and upon their customary tenements, *for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences thereof* respectively, such turf, covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used, every year, at all times of the year, as often, and in *such quantity as occasion hath required*. A 4th special plea laid the custom still more generally to be for the customary tenants to take the turf from the *locus in quo* as often and in such quantity as the occasion required, to be used and spent upon their customary tenements respectively, *for the improvement thereof*. To all the special pleas there was a general demurrer, and joinder.

Const. in support of the demurrer. The right set up, unlimited in its nature, and undefined in its terms, goes to the destruction of the whole common. It is not even confined to ancient gardens; for it is prescribed for every customary tenement *having a garden parcel of the same*; which may include a garden recently made. The turf may be taken at *all times of the year* for the *making and repairing grass plots* in such garden; which may comprize the whole garden, the extent of which need only be limited by the customary

tenement itself and its appurtenances. It may be taken when *occasion* requires; of which the tenant is to be the judge. It is *for the improvement thereof*; a term of very large and doubtful signification, which may include all ornamental improvements. And the right is claimed for tenants and occupiers as well as for customary tenants. The custom stated in the second and subsequent special pleas is still more general and objectionable; extending to taking turf for the making and repairing of banks and mounds, hedges and fences, and for the *improvement of the customary tenements generally*. The common law right of a commoner is confined to the taking of the grass by the mouths of his cattle^(a) which right must be destroyed if the custom set up can exist: but it is a strong argument against its legality, that no custom to the like extent is recognized in the books. In *The Dean and Chapter of Ely v. Warren*, 2 Atk. 189, it was considered by Lord Hardwicke that a right in the tenants of a manor to dig turf in the extensive fen lands of *Cambridgeshire*, though it might be considered in such lands, which often lie under water for several years, to be no more than a compensation to the copyholder for the loss of his profit by grazing them, would be a very odd custom if applied to any other soil. The right of turbary is indeed very frequent; but that might be supposed to arise from necessity in times when other fuel was not easily procured; but even that, as Lord Hardwicke observes in the same case, is confined to such a quantity as is sufficient for the house^(b) to which the common is appendant. And he considered it as a great absurdity to lay the custom not only in the *tenants* but in the *occupants*, who, as tenants at will, could never have a right to take away the soil of the lord. And still more absurd is it to take turf *fit for pasture* for the purpose of making banks and fences. In *Willes v. Broadbent*, 2 Stra. 1224, and 1 Wils. 63, a custom set up for a lord of a manor and his tenants, sinking pits for collieries in the freehold lands, to lay and continue the rubbish and materials, &c. on the lands of customary tenants near the pits, was holden void, as unreasonable and arbitrary, and tending to defeat the copyholder of the whole profits of his land, and to destroy his estate: and there it was laid down, that if any part of the custom be bad, it is void for the whole. So here this custom is unreasonable; for it tends to defeat the purposes for which the common was made, and to destroy the whole estate.

Lawes, contra, contended that the custom was neither inconsistent with the right of common, nor unreasonable, nor uncertain. 1st, However inconsistent it may appear in the abstract, it appears that from all time it has existed in fact concurrently with the right of common. It is in its nature no more inconsistent with the right of common than the acknowledged right of turbary; and *Ld. Coke*, Co. Lit. 122, in enumerating the several sorts of common, mentions, in addition to that of turbary, that of digging for coals, minerals, and the like: in all which the soil itself, as *Blackstone*, 2 Black. Com. c. 3. tit. 3, observes, is lost to the lord; whereas here it is only transferred from one part of the manor to another. So in *Duberley v. Page*, 2 Term Rep. 391, the right of the tenants of a manor to dig gravel and sand on the wastes was found for them; and this was not denied in *Shakespeare v. Peppin*, 6 Term Rep. 741, or in *Peppin v. Shakespeare*, 6 Term Rep. 748, to be a valid custom. This is not stronger than the case of *Hopkins v. Robinson*, 2 Lev. 2, where a prescription for the tenants to have *solan pasturam*, in exclusion of the lord, was holden good. But *non constat* there is any right of pasture in this case, but subject to the other right. 2dly, The reasonableness of this custom must depend upon the degree of its interference with the lord's rights: for he is the only person who can object to it. But it is a good consideration as to him that the custom tends to the improvement of the lord's own estate in the hands of the tenants; of which he will have the

(a) Vide 45 Ed. 3. 25, 26, and Bro. Common, 48, cites 12 H. 8. 2, and vide 13 H. 8. 15, 16.

(b) Vide *Tyringham's case*, 4 Rep. 37.

benefit either in the shape of increased fines on the deaths of the tenants, if the fines be uncertain and dependant on the value of the copyholds, or at any rate, upon the forfeiture or reverter of the estate. And it is material to observe, that the right can only be legally exercised where there is an *improvement in fact* of the customary tenement: of which the lord cannot justly complain. As to the objection that the custom is not alleged to be confined to the improvement in this manor of *ancient* gardens; supposing that were material, which does not seem to be necessary for the reason last mentioned, yet upon these pleadings it must be so understood; for it is laid that "every customary tenant of every the aforesaid *customary tenements*, having a *garden parcel of the same* have *immemorially* dug, &c. turf to be used upon their said customary tenements for the purpose of making grass-plots in the gardens, parcels of the same." Now this custom could not have been used *immemorially* for the purpose of improving the gardens, parcels of the customary tenements, if such gardens had not existed immemorially. [All the Court, however, denied this construction of the custom, as laid; and considered that it was claimed for any garden, parcel of the customary estate, whether ancient or not: they laid stress on the words, "*having a garden*," and, "for repairing grass-plots in the gardens;" not even saying the same gardens, or *ancient* gardens.] As to the 3d special plea, he observed, that the right claimed was nothing more than a species of hedge-bote, which every tenant enjoyed. It was to protect the property, and preserve the boundaries of the land, which was both convenient and reasonable. [Lord *Ellenborough* asked if there were any instance in the books of a custom to take away the soil of the lord to make bounds and banks for the tenants' estate: and especially to take that which was fit for the better purpose of pasture, and apply it to common and inferior purposes?] *The Court* then pressed him as to the uncertainty of the custom as laid. They asked what was meant by the word *improvement*; whether as applied to land it was not always confined to *agricultural* purposes? They observed that the claim was to take the turf *when occasion required*; and asked whether any precedent could be produced of pleading in so loose a manner the claim of any species of agricultural improvement: the *occasion* here was not confined to agricultural purposes: it might be for the purpose of building a summer-house. It was not confined to *necessary* repairs: it would extend to any fanciful repairs. (No answer being given to these suggestions)

Lord *ELLENBOROUGH*, C. J. said, A custom, however ancient, must not be indefinite and uncertain: and here it is not defined what sort of *improvement* the custom extends to: it is not stated to be in the way of agriculture or horticulture: it may mean all sorts of fanciful improvements: every part of the garden may be converted into grass-plots, and even mounds of earth raised and covered with turf from the common: there is nothing to restrain the tenants from taking the whole of the turbarry of the common and, destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom, as laid, but caprice and fancy. Then this privilege is claimed to be exercised *when occasion requires*. What description can be more loose than that? It is not even confined to the occasions of the garden. It resolves itself, therefore, into the mere will and pleasure of the tenant, which is inconsistent with the rights of all the other commoners, as well as of the lord. The third special plea also is vastly too indefinite: it goes to establish a right to take as much of the turf of the common as any tenant pleases for making banks and mounds on his estate: it is not even confined to purposes of agriculture. All the customs laid therefore are bad, as being too indefinite and uncertain.

The other Judges concurred.

Judgment for the Plaintiff.

Wilson v. Knubley.

7 East, 128. Jan. 28, 1806.

An action of *covenant* does not lie upon the stat. 3 W. & M. c. 14, against the devisee of land to recover damages for a breach of covenant made by the devisor : but the remedy thereby given is confined to cases where *debt* lies.

THIS was an action of covenant, wherein the plaintiff declared against the defendant as surviving *devisee of the lands, &c. of John Lawson deceased, there being no heir of the said J. L.*; for that whereas by indenture of release, made the 6th of Feb. 1798, between J. L. of the one part, and the plaintiff of the other, it was witnessed that in consideration of 1050*l.* paid to J. L., he conveyed to the plaintiff in fee certain freehold messuages and lands, &c. at Wigton, in Cumberland, (describing them) : and J. L., for himself and his heirs, covenanted with the plaintiff, her heirs, &c., that he was the true and lawful owner, and seised in his own right of a perfect and indefeasible estate of inheritance in fee simple of and in the same premise, without any incumbrance thereon, &c. to alter, lessen, or defeat the same. The plaintiff then assigned for a breach, that the said J. L. was not, at the time of making the said indenture and conveyance, the true and lawful owner of the premises, nor was seised in fee of an indefeasible estate of inheritance in the same, &c., nor had authority or right to convey the same, &c. to the plaintiff in fee; by means of which the plaintiff was put to divers costs, charges, and expences, viz. 1000*l.* in defending an ejectment brought by J. D. on the demise of J. G. &c. against her to recover an undivided third part of the premises, the said J. G. being entitled thereto; and in the purchase of such undivided share; and in making satisfaction for the rents, &c. of such share, while the plaintiff held the same under the said indenture, &c. And then the plaintiff averred, that J. L. died without heirs; and that the said J. L. in his lifetime, and the defendant *devisee* as aforesaid, since his death, though requested, had not kept the covenants so made by the said J. L. for himself and his heirs with the plaintiff, but has refused, &c. to her damage of 1000*l.* To this there was a demurrer, assigning for special causes, that the plaintiff has declared against the defendant as surviving devisee of J. L. deceased, upon breaches of covenant supposed to have been committed by him in his lifetime, and *has not joined the heir* of the said J. L. in the suit: and for that it appears by the declaration, that the action is not brought against the defendant *as such devisee* in respect of any *obligation or other debt* due from the testator to the plaintiff, but in respect of certain *covenants* of the testator, supposed to have been entered into and broken by him: and for that it is *uncertain* what *damages* the plaintiff has sustained, or may be able to prove by reason of such breaches of covenant: and for that it is not averred or shewn that any lands, &c. which were of the said J. L. at the time of his death have come to the defendant, or been in his hands as such devisee, out of which he may satisfy the damages if any should be recovered against him as such devisee by reason of the supposed breach of covenant, &c. joiner, and

Yates, in support of the demurrer. The case of *Dyke* and another administrators v. *Sweeting*, Willes, 585, which was mentioned as an authority in support of the action, when this case was called on last term, does not apply; for that was *covenant* against an *heir*, which lay at common law, and did not want the aid of the stat. 3 W. & M. c. 14. But at common law no action either of covenant or debt lay against a devisee of land; for the devisee taking by purchase was not bound by the contracts of the testator. That statute, which was made in aid of the stat. 27 Eliz. c. 4, against fraudulent conveyances to defeat creditors, for the first time subjected the debtor's lands to the

process of his creditors in the hands of the devisee: but that is a special remedy, which must be strictly pursued. For though s. 2, of the stat. of W. & M. avoids devises generally, as against creditors, yet the preamble only speaks of devises made to defraud *creditors by bond and other specialties* of their just debts: and the 3d section limits the remedy given to creditors; for it enacts that, "*for the means* that such creditors may be enabled to recover their said debts in the cases before mentioned, every such creditor shall and may have and maintain their *actions of debt* upon the said *bonds and specialties* against the *heirs* at law of such *obligors* and such *devisees jointly*. 2dly, he contended that at any rate the action would not lie against the devisee alone without joining the heir; for no such remedy at law was given by the statute, and a *casus omissus* could not be supplied by the averment that there was no heir. The devisor might have died possessed of other lands, and the present defendant would only be liable to his proportion.(a)

Wood, contra, contended that the action of *covenant* was within the meaning and equity of the statute, being as much within the mischief to be remedied by it as the action of debt. The general object of the statute was to make the devisee liable to answer for those assets which would have been liable in the hands of the heir, if they had been suffered to descend: and as covenant would lie in such a case against the heir, according to *Dyke v. Sweeting*, so by an equitable and reasonable construction of the statute it should lie against a devisee. The act was levelled against *fraudulent devises*, and the remedy could not have been meant to be confined to a particular sort of action, which must in many instances defeat the object. It recites that "it is not reasonable or just that by the practice or contrivance of any debtors, their creditors should be defrauded of their just debts; nevertheless it hath often happened, that several persons having by *bonds, and other specialties, bound themselves and their heirs*, and have afterwards died seised, &c. have, to the defrauding of such their creditors, devised the same;" &c. for remedying of which it absolutely avoids as fraudulent all such devises against such creditors. The action of *debt* spoken of in the 3d clause is merely put by way of instance and example. The act speaks of debtors having bound themselves and their heirs by bonds and *other specialties*, not confining it to specific legal debts. Now here the plaintiff is as meritorious a creditor as if he had advanced his money on the security of a bond. If the lands had descended, there is no doubt that the heir would have been liable in damages for the breach of covenant: nor can it be denied that the devisee would have been jointly liable if a collateral bond had been given by the testator for the performance of covenants; and yet in such action *damages* only are recovered. But the legislature could never have contemplated these distinctions when professing to give a remedy against fraud. Many cases have been ruled to be within the *equity* which are not within the *letter* of statutes. Co. Lit. 24. b., gives the rule where it is within the same mischief: Plowd. 59, applies it to statutes made for the redress of false covin, and to give a speedier remedy to right; to such as are in advancement of justice, and beneficial to the public weal: and by *Gooch's* case, 5 Rep. 60, acts made in prevention or suppression of fraud ought to have a favourable interpretation; and that was applied to the stat. 13 Eliz. c. 5, principally because it provides generally, as the act in question does, that the estate as to the creditor shall be void. So the stat. 4 Ed. 3. c. 7, entitled, "Executors shall have an action of trespass for a wrong done to their testator," reciting that, "in times past executors had not had actions for a trespass done to their testators, as of goods of the same testators carried away in their life, and so such trespasses have hitherto remained unpunished," enacts, "that the executors in such cases shall have an action against the trespassers, and recover damages,"

(a) Vide *Hume v. Edwards*, 3 Atk. 693.

&c.: yet it was holden, 1 Leon. 194, in the Exchequer Chamber, that an executor shall have an action upon the case *de bonis testatoris* come to the hands of another and by him converted to his own use, &c. *by the equity of the statute*. 2dly, The allegation that the testator had no heir, (being in truth a natural child,) is sufficient to warrant the suing the devisee alone: and so Lord Chancellor *Cowper* thought in *Gwiler v. Wade*, 1 P. Wms. 100, though he held that the heir, where there was one, must be made a party, notwithstanding he had no real assets by descent. [*Lawrence*, J. May it not be inferred from that case, that Lord *Cowper* thought if there had been no heir it would have been a reason for the creditor's going into equity?]

Yates, in reply, referred to *Westfailing v. Westfailing*, 3 Atk. 460, as a case where a construction had been put upon this statute; but Lord *Hardwicke* there relied on the words being sufficiently large to extend the remedy of the statute to the case then before him, which was clearly within the mischief of it, and therefore he would not narrow them.

LORD ELLENBOROUGH; C. J. The grievance now complained of, how great soever it may be, existed at common law down to the period of the stat. 3 W. & M.; by which statute the devisee is, for the first time, made chargeable jointly with the heir for the debts of his testator in respect of lands devised to him. I agree with the plaintiff's counsel, that the grievance recited in the preamble of the act would have led one to suppose that the legislature meant to have given a larger remedy than the action of debt. For it recites, &c. and by s. 2, it says, that all wills, &c. shall be deemed fraudulent and void as against such creditors: but when they come to provide the means whereby the creditors are to be remedied, they are more limited than the grievance recited. For s. 3. says, "*for the means that such creditors may be enabled to recover their said debts, that in the cases before mentioned, every such creditors shall have their actions of debt upon the said bonds and specialties,*" &c. If it had only said, that they would have their *actions*, without more, there would have been ground for going the length of the argument of the plaintiff's counsel; but the legislature have expressly limited the means of recovery by such creditors to *actions of debt*. Supposing, therefore, that we could go to the extent of saying that an averment of there being *no heir* is equivalent to joining the heir, where there is one, in the action; supposing we could get over that difficulty; how could we, construing a comparatively recent act of parliament where a particular remedy is given by *action of debt* on bonds and specialties, where no remedy was before, extend it to actions of *covenant*? It is said, however, that the statute being made in advancement of justice and suppression of fraud, ought to be extended by equitable construction to meet the grievance; and the construction which has been put upon the stat. 4 Ed. 3. c. 7, is relied on. But that, it must be remembered, is a very ancient statute, passed at a period when no great precision of language prevailed: and the body of the act does not speak of *actions of trespass*, though the instance put is proper for such an action; but it speaks of actions *for a trespass* done to the testator's goods; and it enacts that executors in such cases shall have *an action against the trespassers*; apparently using the word *trespass* as meaning a wrong done generally, and the *trespassers* as *wrong-doers*: (a) it does not specify the nature of the action. The words, therefore, were capable of letting in a construction which met the mischief intended to be redressed. But we cannot bring within the equity of the stat. of W. & M. a remedy which the legislature have almost, as one may say, in express terms excluded; for it says what *the means* of such creditors recovering their *said debts* shall be, and in stating those means it only gives the *action of debt*. To extend it, therefore, to the action of *covenant*, would be to legislate, and not to construe the act of the legislature.

(a) Vide *Peyton's case*, 9 Rep. 78, a. & b.

GROSE, J. At common law neither *debt* nor *covenant* lay against the devisee : but the legislature have given a remedy against him by the stat. 3 W. & M. ; that remedy however is express, and is confined to the action of *debt*. And though the word *specialties* be used as well as *bonds*, yet construing the whole together it must be confined to such *specialties* on which the *action of debt* lies. And whoever looks at the statute attentively will see that such must have been the intention of the legislature : for it speaks all through of *debts* ; but a mere breach of covenant cannot be considered as a debt. As to the argument drawn from the construction put upon the stat. 4 Ed. 3, my lord has given a clear answer to it.

LAWRENCE, J. This is an attempt to extend the remedy given by the stat. 3 W. & M. against devisees to another form of action than what is expressly given by that act. But though we should be glad to give the statute all possible effect in suppression of the species of fraud against which it was levelled as far as it will admit of, yet it will not admit of this extension. For in the very preamble it speaks of the practice or contrivance of *debtors* to defraud their *creditors* of their just *debts* by devising away their lands, &c. in such manner as such *creditors* have lost their *said debts* : and afterwards it proceeds to point out *the means* whereby such *creditors* may be enabled to recover their *said debts* : and then enacts, that in the cases before mentioned every such *creditor* shall have his *action of debt*, &c. against the heir of such *obligor* and such devisee jointly. All through it speaks of *debts* which must mean existing debts. But what is this ? it is an action of covenant to recover damages for a breach of the testator's covenant to make a good title to an estate ; and part of the damages sought to be recovered is the amount of the costs and expences of defending an ejectment brought against the plaintiff by the owner of the estate who recovered it ; which never could be considered as a *debt* due from the testator at the time of his death within the meaning of the act. Then as to the case relied on upon the construction of the stat. 4 Ed. 3, the words of that statute are very loose and general, and not confined, as in this case, to any particular form of action. Besides, in construing ancient statutes attention is always to be paid to the language of the times. It speaks of a *trespass* as of a *wrong* generally ; and it enacts, that the executors shall have *an action*, not saying what form of action, against the *trespassers*, meaning thereby *wrong-doers*. But here the words giving the form of action are very precise ; and we cannot extend the remedy to any other form of action, although I agree that it is within the mischief.

LE BLANC, J. I agree that it would have been better for the legislature to have extended the remedy to cases like the present ; but I doubt whether such cases were within their contemplation at the time of passing the act ; and they are admitted not to be within the letter of it. The legislature seem only to have contemplated persons who had bound themselves in certain sums by bonds and other specialties, which they considered as *debts* ; and they gave a remedy which was clearly only adapted to such bonds and specialties. They therefore only contemplated what were *debts* strictly so called, and did not mean to extend the remedy against devisees to the recovery of *damages* for breaches of covenants or contracts made by their testators. If then we were to bring this case, which, is clearly not within the *words*, within the *equity* of the statute, we should be giving it a construction against what appears to have been within the contemplation of the legislature, and certainly against the express letter of the act : though I agree that it would have been better to have extended the remedy to the general mischief recited.

Judgment for the Defendant.

Newton, Assignee of Stelfox, a Bankrupt, v. Chantler.

7 East, 138. Jan. 28, 1806.

A bill of sale to a particular creditor of *all* the effects of a trader, in trust to satisfy his debt, and pay over the surplus (if any) to the trader, is an act of bankruptcy, and of no effect as a conveyance, notwithstanding it was given by the trader *when under arrest at the suit of the particular creditor* for a just debt, and followed by an immediate change of possession. There was another writ out against the trader at the time, and he knew that he was in insolvent circumstances, but it did not appear that these facts were known to the particular creditor.

IN trover for certain goods and stock in trade, late the property of the bankrupt, which was tried at the last Summer Assizes at *Chester*, a verdict was found for the plaintiff for 300*l.*, subject to the opinion of this Court on the following case.

Stelfox, being a malster and trader, became indebted to the defendant, a banker at *Northwich*, in 300*l.*, and to the plaintiff in 690*l.*, for just debts, who for recovery thereof respectively sued out bailable process against *Stelfox* in June 1803. The defendant's writ was first delivered to the sheriff, who thereupon arrested *Stelfox* on the 24th of June 1803. *Stelfox*, being in custody upon that arrest, in order to procure his release agreed to give a bill of sale of *all his goods and stock in trade* to the defendant for securing the payment of his debt, who then declared that he should immediately put the same in force; whereupon a bill of sale, on the said 24th of June 1803, was made and executed to the defendant by *Stelfox*; by which reciting that *Stelfox* was justly and truly indebted to the defendant in 800*l.*, he, for the better and more speedy raising and paying the said 300*l.*, granted, bargained and sold absolutely to the defendant "*all and singular his household goods and furniture, malt, stock in trade, and effects whatsoever*, then remaining and being in, upon, or about the messuage or dwelling-house, malt-kiln, and premises, which he then inhabited and occupied, situate in *Rudheath*, and *all other his goods, chattels, and effects whatsoever, in whose hands, custody, or possession soever the same then were* or might be found, and *all his estate, right, title, and interest of, in, and to the same, and every part and parcel thereof*; to have and to hold all and singular the goods, malt, chattels, and effects whatsoever thereby before granted, bargained and sold, or intended so to be, to the defendant, as his own proper goods, &c. for ever; to the intent and purpose that the defendant, his executors, &c. should and might by sale and disposal of all or any part of the said goods and premises raise the said sum of 300*l.*, together with all reasonable costs and charges attending the sale and disposal of the said goods, &c. and render and restore the overplus of the said goods and money (if any be) unto him, *Stelfox*, his executors or administrators." And *Stelfox* did thereby for himself, his executors, &c. warrant the said goods, &c. to the defendant against himself (*Stelfox*), his executors and administrators, and against all and every other person and persons whomsoever: of which goods and chattels, the bill of sale further stated that he had put the defendant in full possession by delivery of a knife at the sealing and delivering of those presents. The defendant on the said 24th of June 1804, and immediately after the execution of the bill of sale, took possession by virtue of the bill of sale of the property thereby assigned, being the property mentioned in the declaration, and without loss of time caused the same to be sold; and the proceeds of the sale, after satisfying an extent before that time duly issued at the suit of the Crown against *Stelfox*, amounted to 300*l.* *Stelfox* at the time of executing the said bill of sale knew that he was in insolvent circumstances; but he had not then committed any act of bankruptcy. On the 6th of July 1803, a commission of bankrupt duly issued against *Stelfox* on the petition of the plaintiff, under

which he was declared a bankrupt; the commissioners being of opinion that the execution of the bill of sale to the defendant was an act of bankruptcy; and the plaintiff being duly chosen assignee, an assignment was duly executed to him of the personal estate and effects of the bankrupt. The question was, Whether the plaintiff were entitled to recover? If he were, the verdict was to stand: if not, a nonsuit was to be entered.

Richardson for the plaintiff. The question is, whether a bill of sale executed by a trader of all his effects to a particular creditor to satisfy his debt, rendering the surplus (if any) back to the trader himself, is not an act of bankruptcy? The stat. 1 Jac. 1. c. 15. s. 2, enacts, that every trader who shall "make any *fraudulent* grant or conveyance of his lands, goods, &c. to the intent or *whereby* his creditors may be defeated or *delayed* for the recovery of their just debts, shall be adjudged a bankrupt." In the construction of which the *fraud* spoken of has not been confined to *moral* fraud, but any conveyance is a fraud within the meaning of the act, which necessarily defeats or contravenes the great object of the bankrupt laws; which is, that when a trader's affairs come to a stop, he shall not carve out his whole estate to a particular creditor, but it shall be divested out of his management, and placed in the hands of trustees appointed by statute, for the purpose of being distributed equally amongst all the creditors. Now a conveyance of *all* a trader's property must necessarily break up his trade, and delay all the rest of his creditors till the particular creditor is satisfied; and if he be insolvent, it must necessarily defeat them. The cases of *Miles v. Williams*, 1 P. Wms. 251; *Worseley v. De Mattos*, 1 Burr. 476; *Wilson v. Day*, 2 Burr. 827; *Alderson v. Temple*, 4 Burr. 2235; *Law v. Skinner*, 2 Blac. 996; *Rust v. Cooper*, Cowp. 629; *Butcher v. Easto*, Dougl. 295, are all full to this purpose, and the latter is strongly in point to this case. For though *Revett* the trader was not arrested at the suit of *Easto*, but of another person, yet the bill of sale was given to *Easto* as a security for his bailing *Revett*, then in custody under that process: and it cannot make any material difference to whom the security be given, as in either case it is equally given by the trader under the compulsion of legal process, and in order to free himself from arrest. In *Cox v. Morgan*, 2 Bos. & Pull. 398, it was indeed determined by two Judges against one in *C. B.* that a payment of a bill of exchange to a creditor, made under an arrest, was protected by the stat. 19 Geo. 2. c. 32, as a payment "*in the usual and ordinary course of trade and dealing*," the creditor not knowing that the debtor had committed a previous act of bankruptcy, or that he was even in insolvent circumstances. But at any rate, this is very distinguishable from that case, for a bill of sale of all a trader's effects can in no respect be considered as a payment within that act.

J. Clarke, contra, admitted that the present question turned upon the construction of the stat. 1 Jac. 1. c. 15. s. 2, the material word of which is the word *fraudulent*: but in order to ascertain whether any particular grant or conveyance be *fraudulent* or not, the court must look to the circumstances before and accompanying the deed, and cannot collect it from the inspection of the deed itself. In *Worseley v. De Mattos*, 1 Burr. 484, Lord Mansfield considered the deed itself as equivocal and indifferent upon the face of it, and he looked only to the extraneous circumstances to decide whether or not it were fraudulent. Now here no moral fraud can be imputed to the transaction: the debt *bona fide* due to the defendant from *Stelfox* was 300*l.*; the goods conveyed, after satisfying the extent of the crown, were worth no more; the defendant declared before the execution of the bill of sale that he should immediately put it in force, and he did so as soon as it was executed. In *Wilson v. Day*, 2 Burr. 827, the principal stress was laid on the circumstance that there was no alteration of the possession after the execution of the deed conveying away the trader's property, which was considered as a badge of fraud: and so it was in *Law v. Skinner*, 2 Blac. 996. In *Butcher v. Easto*, Dougl. 294, the

security was not given to the creditor who made the arrest; and Lord *Mansfield* laid stress on this, that the trader must have contemplated at the very time the act of bankruptcy which he committed within twenty-four hours afterwards. And *Compton v. Bedford*, 1 Blac. 362, also went on that ground. As to the bill of sale sweeping away the whole property of the trader, the same effect would have been produced if the defendant's suit had proceeded to judgment and execution, to which no objection could have been made: and it would be absurd that the resistance of a trader to a just suit should give the creditor an advantage.

Richardson, in reply, insisted that the very bill of sale itself, independent of any collateral circumstances, was a fraud upon the bankrupt laws: but if any such were wanting, it would be found in the fact stated that *Stelfox* knew at the time of giving the bill of sale that he was in insolvent circumstances, and therefore he must have intended to give the defendant a preference over his other creditors. The defendant likewise must have known that by taking such a bill of sale the insolvency of the debtor must necessarily ensue, as he could no longer carry on his trade. There is no necessity for fraud in fact; for in *Wilson v. Day*, 2 Burr. 830, Lord *Mansfield* considered the deed to be very fair as between the parties; and fraudulent and void only as it tended to defeat the system of the bankrupt laws.

LORD ELLENBOROUGH, C. J. This question arises upon the validity of a deed of sale of all his goods and stock in trade made by a trader under arrest at the suit of the vendee, there being then another writ out against him at the suit of another creditor. The trader was in insolvent circumstances, and known to himself to be so at the time. Now the execution of such a bill of sale, under these circumstances, has in all the cases been considered, *prima facie* at least, as fraudulent: and it is incumbent on the party who sets it up to shew something to rebut that presumption. As a general proposition it cannot be disputed, that a conveyance by deed by a trader of all his property to a particular creditor in prejudice to the rest is an act of bankruptcy. Every man must be taken to contemplate the ordinary consequences of his own act at the time of the act done. Here the necessary effect of the act done was to turn round all his other creditors, and prevent them from pursuing their present ordinary remedy against him for the payment of their demands; leaving them only to look to him for the future surplus, if any. Being insolvent within his own knowledge at the time, and two writs out against him, he must have contemplated bankruptcy by means of arrest and laying in gaol two months; and under these circumstances he gives the bill of sale to one of his creditors, conveying all his property. Must he not then have contemplated the necessary consequence of his own act? And as such an act must have the effect of defeating or delaying all his other creditors, by stripping him of all he had, and disabling him from carrying on his trade, must I not deduce the inference from it that he meant to defraud all his other creditors. This then constitutes an act of bankruptcy, and cannot be distinguished in principle from the case of *Butcher v. Easto*, where the same thing was done in effect; for the bill of sale was there given under the pressure of legal process, though not at the suit of *Easto*, who redeemed the trader from the arrest of another creditor by becoming bail for him. This is not like a partial conveyance only of a trader's property, which is open to a different consideration.

GROSE, J. When a trader disposes of all his property to a particular creditor, it must necessarily defeat all his other creditors of recovering their just debts: the law therefore considers the deed as fraudulent and void. This is distinguishable from cases where he conveys only a part of his property.

LAWRENCE, J. As the necessary consequence of this deed of conveyance was to take the whole effects of the trader, which the law says shall be dis-

tributed equally amongst all the creditors, and to give them to a particular creditor, this within all the cases is an act of bankruptcy: and it is not less the grant or conveyance of the bankrupt to the prejudice of his other creditors, because at the time he made it he was under arrest at the suit of the defendant.

LE BLANC, J. The principle of all the cases is, that if the conveyance to a particular creditor *necessarily* prevent the property of the trader from being distributed as the law requires in cases of bankruptcy, that is itself an act of bankruptcy. But this is attempted to be distinguished from the general case upon the ground that the security was given to the particular creditor at a time when he held the trader under arrest. But I cannot distinguish this in principle from *Butcher v. Easto*. There the security was given by the trader when under arrest; and though not to the particular creditor who had arrested him, yet to another creditor by whose means he was liberated, and who on that condition became bail for him. And that, having been determined to be an act of bankruptcy, does away the only distinction which is pretended between this and the general class of cases where a conveyance of all a trader's effects to a particular creditor has been uniformly holden to be an act of bankruptcy.

Postea to the Plaintiff.

The King v. Woodcock.

7 East, 146. Jan. 29, 1806.

Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a conviction for such offence returned by *certiorari* into B. R. it ought to appear on the face of the evidence stated in such conviction, that the prosecution was in time; and if the witness be only stated to have mentioned the month in which the offence was committed, *omitting the year*, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having convicted the defendant.

A CONVICTION on the malt act, 42 Geo. 3. c. 38. s. 30, stated, that on the 29th of May 1805, an information was exhibited before A. B. and C., three justices of the peace in and for the county of *Suffolk*, by R. P., officer of excise, who informed the said justices, that the defendant was a malster at H. in the said county, "and so being there such malster, he, the defendant, within three months now last past, viz. on 22d of May now last past, at H. aforesaid, did wet certain corn of him the defendant then and there making into malt, in a certain stage of operation, (and so set out an offence within that act)(a), contrary to the form of the statute; for which the defendant hath forfeited 200l." &c. The conviction then set out the summons to the defendant to appear, the evidence, and other proceedings, and concluded with the adjudication of conviction. But in setting out the evidence of the offence it was only stated, that the witness deposed "that the defendant at the time of the committing the offence mentioned in the said information was a malster at H. &c. That the witness on the 22d of May (not stating in what year) went to the defendant's malt-house at H. aforesaid, where he found a floor of malt then in operation," &c. (and so proceeded to state the fact of the offence).

Alderson, amongst other things, objected that the evidence, as set forth, did not shew an offence committed within the time limited for the prosecution. To which

Freere, in support of the conviction, answered, that it was expressly so stated

(a) Vide *Rez. v. Skone*, 6 East, 514.

in the information, to which the evidence must be taken to refer; and that unless the justices had been satisfied that the witness was speaking of the 22d of May 1805, they would not have convicted the defendant: and this was a conclusion of fact which it was competent for them to draw from the evidence stated. But by

Lord ELLENBOROUGH, C. J. The evidence ought to appear to support the information, and the justices should either have stated the evidence of the witness to be that the offence was committed on the 22d of May 1805, if they really so understood the witness to mean: or if they had any doubt of that, they should have inquired of him more particularly as to the date of the fact. But here the date of the year neither appears expressly by the evidence, nor by any words of reference to any other date which is certain. And if they have done their business slovenly, we cannot supply their omission. As it stands on the conviction, the offence does not appear to have been committed within three months before the prosecution commenced, which is necessary to give them cognizance of it.

The other Judges concurring on this ground;

Conviction quashed.

Scholey and Domville v. Mearns.

7 East, 148. Jan. 31, 1806.

To debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return day, but *before the sheriff was ruled to return the writ*; and who accepted the money so paid by the defendant in full satisfaction and discharge of the bail-bond and fees, &c. and that if any damage were afterwards incurred for default of the defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c.: for it does not thereby appear that the sheriff's officer had either a legal or an equitable interest, (even supposing the latter would have sufficed,) in the bond as the time of the supposed satisfaction received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for money, but for a collateral act; and supposing that it could be so pleaded after the day stipulated for performance of the act.

THE plaintiffs declared in debt on a bail-bond to them as sheriff of *Middlesex*, in 40*l.* The plea, after craving oyer of the bond and condition, (which was for the appearance of the defendant in *B. R.* on *Wednesday* next after 15 days of *Easter*, to answer *G. Loveday* in a plea of trespass, and also to a bill against the defendant for 50*l.* on promises, &c.) stated, that the defendant ought not to be charged, &c.; because the action was brought and prosecuted by the plaintiffs for the use and benefit of one *J. Simpson*, and as trustee for him, and not for their own use or benefit; and that before the making of the bail-bond, viz. on the 29th of *March* 1805, at, &c. the defendant was arrested by the said *J. Simpson*, one of the bailiffs of the plaintiffs as sheriff of *Middlesex*, by virtue of a bill of *Middlesex*, before issued out of *B. R.* at the suit of the said *Loveday* against the defendant, and returnable on *Wednesday* next after 15 days of *Easter* then next, and which precept was indorsed for bail for 20*l.* and by virtue of a certain warrant of the said sheriff for executing the said precept, and directed to the said *J. Simpson*, as one of his bailiffs, and which was also indorsed for bail for 20*l.* That the defendant, being so arrested, gave the bail-bond in question, conditioned for his appearance according to the tenor of the said precept; and that having been so arrested by the said *J. Simpson*, as such bailiff of the said sheriff, the defendant afterwards and before the return of the said precept, viz. on the said 29th of *March* 1805, at, &c. paid to the said *J. Simpson* 22*l.* for the debt and costs

in the action by *G. Loveday* against him, and for the fees and expences of the arrest, bail-bond, and other charges; and that afterwards, and before the return of any rule of the Court of *B. R.* upon the sheriff to return the writ, and before the commencement of this suit, viz. on the 2d of *May* 1805, the defendant paid to *J. Simpson*, as such bailiff, &c. the further sum of 5*l.* for the debt and costs in the said action, and for the fees, expences, and charges of the arrest, bail-bond, and damages, &c., making in the whole 27*l.*, which sum was at the time the same was so paid fully sufficient to pay and satisfy the said *G. Loveday*, the plaintiff in the said suit, the debt and costs, &c. and fees, costs, and expences of the said arrest, &c., and all proceedings had thereon, &c.: and which sum of 27*l.* so paid in manner aforesaid the said *J. Simpson* then and there accepted of and from the defendant in full satisfaction and discharge of the bail-bond, and of all damages and cause of action in respect thereof: And that if any damage or expence has accrued or been incurred by reason of the defendant's not appearing in the said court, &c. according to the condition of the bail-bond, and the exigency and tenor of the said precept, subsequent to the payment of the said 27*l.*, the same was occasioned by the default of the said *J. Simpson*, not paying over to the plaintiff in the action, or his attorney, the amount of the debt and costs which would have been taken and accepted by the said plaintiff or his said attorney, and sufficient to pay which, over and besides such fees, expences and charges as aforesaid, had been so paid by the defendant to the said *J. Simpson* as aforesaid, &c. To this there was a demurrer, assigning for special causes, that no competent discharge by the plaintiffs of the bail-bond or condition thereof, nor any legal satisfaction of the same to them is stated in the plea. That it is not thereby shewn at what time or place, or under what circumstances the plaintiffs became or were trustees for *J. Simpson*, or where or in what manner *J. Simpson* became entitled to any benefit from the bail-bond: and that it is not alleged that he had any beneficial or other interest in the same at the time of his acceptance of the money supposed by the plea to have been paid to him in satisfaction and discharge thereof. And that even if *J. S.* were at that time interested in such bail-bond, no sufficient discharge thereof by him, or satisfaction of the same to him in law, is shewn, &c. Joinder in demurrer.

Marryat in support of the demurrer. 1st, This is not a bond for the payment of money, but for the doing a collateral act on a certain day, which bond became forfeited, because the time passed without the defendant having done the act. And a bond for doing a collateral act can only be discharged by deed or by performance: though if the bond be for money, then by accord before the day any thing else may be received in satisfaction. This distinction is fully established in *Peytoe's* case, 9 Rep. 77. *b.* *Anon.* Dy. 1, and *Preston v. Christmas*, 2 Wils. 87. Vide *Rogers v. Payme*, ib. 376. 2dly, Supposing the defendant could plead satisfaction before the breach, yet satisfaction afterwards cannot be pleaded. Cro. Eliz. 46. Now here it is only alleged that the two payments combined amounted to satisfaction, one of which appears to have been made after the return of the writ. Before the stat. 4 Ann. c. 16. s. 12, payment after the day of the principal and interest due by the condition of the bond could not be pleaded in bar to the action. 3dly, This is not pleaded as accord and satisfaction, or even agreement for satisfaction with the sheriff, to whom the bond is given, but with *Simpson*, the bailiff; who does not appear to have had any original interest in the bond, nor does it appear that the plaintiffs were trustees for him when it was given, but only that the action is now brought for his benefit. But if *Simpson* could not have released the bond, it is clear that he could not accept satisfaction for it. And that he could not have released the bond, though given for his use, was decided in *Offy v. Warde*, 1 Lev. 235, and *Scudamore v. Vandenstene*, 2 Inst. 673. And he observed that no injustice could ensue here, as the Court exercised an equitable summary jurisdiction over their officers in these cases, in directing bail-bonds

to be delivered up to be cancelled if the bail were entitled to relief: but this was an attempt, as was said by *Buller, J.* in *Donnelly v. Dunn*, 2 Bos. & Pull. 47, to set up as a legal defence that which rather belonged to what might be called the equity side of the court.

Espinasse, contra. The plaintiffs, by the demurrer, admit that the action is brought by them as trustee for their bailiff and for his use; and then the case of *Bottimley v. Brook*(a), is in point to shew that a plea to an action on a bond, that it was given to the plaintiff in trust for another, so as to let the defendant into a defence which he had against the *cestui que trust*, is good. And the same case shews that it is not necessary to set forth how the plaintiffs are trustees; for the plea there was general. Besides, a party is not supposed to be cognizant of his adversary's title in all particulars: therefore in covenant against an assignee, it is always sufficient for the plaintiff to declare that the premises came to the defendant *by assignment*, without shewing how. The plea then states further, that the defendant was arrested under a writ directed to the plaintiffs as sheriff, and a warrant made by them to the officer, for whom it is averred that they are suing as trustees; and that before the sheriff was ruled to return the writ, and consequently (by adverting to the law and practice of the Court, of which the Court now will take notice) before the sheriff had become liable to the plaintiff in the original action, the whole debt, costs, and expences, amounting to 27*l.*, were paid to the plaintiff's own officer; which sum was accepted by such officer in full satisfaction of the original plaintiff's demand, and in discharge of the bail-bond; and that if any subsequent loss accrued by reason of the defendant's non-appearance, it was occasioned by the bailiff's own default, as trustee for whom the plaintiffs are admitted by the demurrer to sue. In many instances the Court takes notice of sheriff's officers as servants for whose acts the sheriff is answerable in the execution of his duty, and of whom he takes security. The Court will also take notice that the real object of a bail-bond is to indemnify the sheriff against the payment of the plaintiff's debt in case the defendant does not appear at the return of the writ; which by the practice of the Court is extended to a future day, before which the satisfaction was accepted: and it is clear that the acceptance of a lesser sum *before, Pinne's case*, 5 Rep. 117, the day is a good satisfaction of a bond, which this must in substance be taken to have been.

Marryat said, that the cases of *Bottimley v. Brook*, and *Rudge v. Birch*,(b) had been since over-ruled in a case of *Lane v. Chandler*, in the Exchequer.

Lord ELLENBOROUGH, C. J. If we were to take notice of such a defence as this, there would be an end at once of the simplicity of the common law, and of all the distinctions between law and equity. Is it not decisive in this case that the officer could not have released the bond; and if he could not release, how could he accept any thing in satisfaction of it? The remedy must be sought in another way. The statute 4 Ann. c. 16. s. 20, which makes bail-bonds assignable to the plaintiff in the action would have been unnecessary if before that the bond was generally assignable at law. This is not brought within any of the cases; for in those which have been referred to, it was at least alleged that the bond was originally given in trust for the party against whom the cross-demand was set up: but it is not alleged here, that the bond was originally given to the sheriff in trust for the officer by whom satisfaction is averred to have been received, nor does it appear how he afterwards came to have any equitable interest in it. But supposing that the circumstances disclosed could have operated as satisfaction of the bond to the sheriff, then the plea is ill conceived, for it should have been pleaded as satisfaction to the sheriff. So that in no view of the case can the plea be sustained.

(a) M. 22 Geo. 3. C. B. cited in *Winch v. Keeley*, 1 Term Rep. 621.

(b) M. 25 Geo. 3. B. R. cited also in 1 Term Rep. 622.

LAWRENCE, J.(a) declared himself of the same opinion, and animadverted upon the experiment made in this case, of pleading matter as a defence at law, which, as was observed by Mr. Justice *Buller* in the case mentioned, was nothing more than the equitable practice of the Court in exercising a summary jurisdiction over its officers.

LE BLANC, J. This does not come within any of the cases which have been determined; for it does not appear that the officer had even any equitable interest in the bond at the time of the supposed satisfaction made to him in discharge of it.

Judgment for the Plaintiffs.

Hovil and Others, Assignees, &c. of Wardell, a Bankrupt, v. Browning.

7 East, 154. Jan. 31, 1806.

A creditor for goods sold and delivered to a trader who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the Mayor's Court of London against the *garnishee*, who thereupon paid him the amount of the debt so attached: afterwards a commission issued: held that this payment was not protected by the st. 19 Geo. 2. c. 32, not being a payment made by the bankrupt in the usual and ordinary course of trade and dealing; and held that the assignees of such bankrupt, under a third commission issued against him, might sue for and recover back such payment, although the bankrupt, who had obtained his certificate, under his former commissions, had not paid 15s. in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors under the second commission respectively.

IN *assumpsit* for money had and received by the defendant for the use of the plaintiffs, as assignees of *Wardell*, to which the general issue was pleaded, a verdict was found for the plaintiffs for 367l. 16s. 6d. before Lord *Ellenborough*, C. J. at the Sittings at *Guildhall* after last *Trinity* term, subject to the opinion of the Court upon the following case.

In Nov. 1802, *Wardell*, being a trader, became indebted to the defendant in 367l. for goods sold and delivered, and on the 27th of Jan. 1803, set sail in a ship, of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. In July 1803, insurances to the amount of 3400l. were effected for the bankrupt by Mr. *De Beaume*, a policy-broker residing in London, and in the same month the ship and cargo were captured by the French. On the 20th of Jan. 1804, the defendant brought an action in the Mayor's Court of London against the bankrupt, and attached 367l. in monies numbered in the hands of *De Beaume*, who had received the amount of the policies of insurance from the underwriters: and the defendant having, on the 28th of the same month, obtained a regular judgment by default in that action, received 367l. from *De Beaume*. The bankrupt returned to England in Feb. 1804, and on the 9th of March following, a commission of bankruptcy was issued against him, under which the plaintiffs were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the plaintiffs, as such assignees, out of the monies he had collected on the policies the amount of the payment he had made to the defendant. *Wardell* had been a bankrupt twice before, (viz.) once in the year 1786, and again in the year 1788; and had obtained his certificate under those commissions, but had not paid a dividend of 15s. in the pound under the last of them; and his creditors at that time still remain unsatisfied. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If the Court should be of opinion that

(a) *Grose*, J., was absent.

the plaintiffs were entitled to recover, the verdict was to stand: if not, a non-suit was to be entered.

Sedgwick, for the plaintiffs, made two questions, 1st, Whether the judgment under the foreign attachment authorized the retaining by the defendant of the money paid to him by *De Beaume* out of the property of the bankrupt? 2d, Whether the non-payment of 15s. in the pound under the second commission against the bankrupt prevented the vesting of the property in his possession at the time of the third commission in the plaintiffs who were the assignees under such third commission? 1st, The property of a bankrupt vests in his assignees by relation of law from the act of bankruptcy: which relation is founded upon the policy of the bankrupt laws to avoid fraud and to promote an equal distribution of the property amongst all the creditors. Here the act of bankruptcy was before the 27th of Jan. 1803, and it was not till July of the same year that the policies were effected: at that time, therefore, the ship and the goods were by relation of law the property of the assignees, and not of the bankrupt: and it was not competent for him to dispose of the proceeds of those policies in the event of a loss otherwise than by one of the modes of payment excepted by the statutes; (a) the only one of which applicable, if at all, to the present case, is by the stat. 19 Geo. 2. c. 32, which enacts that, after a secret act of bankruptcy, "no creditor of a bankrupt, for or in respect of "goods *bona fide* sold to such bankrupt, or for or in respect of any bill of exchange *bona fide* drawn, negotiated, or accepted by such bankrupt in the "usual or ordinary course of trade and dealing, shall be liable to refund to "the assignees, &c. any money which before the suing forth of such commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt, before such time as the person receiving the same shall know, understand, or have notice "that he is become a bankrupt, or that he is in insolvent circumstances." Now money paid under a judgment recovered can in no sense of the words be deemed to be a payment in the usual and ordinary course of trade and dealing, but the very reverse of it: because it is in default only of such a payment as is described in the statute that recourse is had to the compulsory process of the law. That the words of the statute have always been construed strictly appears from *Bradley v. Clark*, 5 Term Rep. 197, where money paid by the bankrupt after a secret act of bankruptcy to a carrier for the carriage of goods, not being for the goods themselves, was holden not to be a payment protected by the act: and *Copland v. Stein*, 8 Term Rep. 199, where money advanced by a factor on the security of the bankrupt's goods could not be retained. Even a payment upon a bill of exchange, if time be given, takes it out of the statute, by reason of the words in the usual and ordinary course of trade and dealing, *Vernon v. Hall*, 2 Term Rep. 648. It makes no difference that a commission of bankrupt was not issued at the time of the payment received, because it is sufficient to avoid it, if the creditor do but understand that the trader is in insolvent circumstances: and the very fact of being obliged to sue for the recovery of a just debt affords an inference that the creditor must know or understand that the trader is in insolvent circumstances. In *Hunter v. Potts*, 4 Term Rep. 182, money of the bankrupt attached in a foreign country, to which the bankrupt laws did not extend, was yet recovered back by the assignees. And in *Sill v. Worswick*, 1 H. Blac. 665, it was so recovered back, though attached by the creditor abroad before the assignment under the commission at home. [*Le Blanc*, J. Both those were cases of creditors who were cognizant of the bankruptcy, and who proceeded against the bankrupt's property abroad in order to get a preference, in fraud of the bankrupt laws, by which they were bound.] At the time of the judgment recovered, however, in the Mayor's Court, the property attached by the defend-

(a) These are severally referred to in the argument of the case of *Copland v. Stein*, 8 Term Rep. 201.

ant, as belonging to the bankrupt, was the property of the assignees, who were no parties to the suit, and could not be affected by that judgment. 2dly, As to the title of the assignees under the third commission to sue, that depends on the stat. 5 Geo. 2. c. 30. s. 9, which enacts, "that in case any commission of bankrupt shall issue against any person who shall have been discharged by virtue of that act, or shall have compounded, &c. the body of such person conforming as aforesaid shall be free from arrest and imprisonment by virtue of this act; but the future estate and effects of every such person, shall remain liable to his creditors, as before the making of that act; unless the estate of such person against whom such commission shall be awarded, shall produce clear, after all charges, sufficient to pay every creditor under the said commission 15s. in the pound for their respective debts." The statute makes no actual transfer of the bankrupt's after-acquired property, but only makes his future effects liable as before the granting of the certificate under the second commission. Those claims, however, are left to be enforced at law by each particular creditor: each must sue for himself, (a) and appropriates to his own use what he recovers, without accounting to the other creditors: for after a certificate allowed under the second commission, the assignees, as such, have no further claim to after-acquired property; for they can only claim in trust for all the creditors. Besides, after an interval of so many years the statute of limitations has run upon all the prior debts.

The Court were all clear upon this point with the plaintiffs, that the future estate of the bankrupt only remained liable to the claims of his individual creditors under the second commission, not having received 15s. in the pound, which they might respectively sue for as in other cases; but that it could not prevent the vesting of the bankrupt's estate in the assignees under a third commission for the benefit of all the creditors.

Jervis, contra. The principal question, is, Whether the payment to the defendant by *De Beaume*, under the judgment of the Mayor's Court, out of the bankrupt's estate, attached in his hands, be protected by the stat. 19 Geo. 2. c. 32. s. 1. ¶ This is a remedial law, made to protect persons receiving payments from traders for goods sold and delivered, or upon bills of exchange in the usual and ordinary course of trade and dealing, before notice of their bankruptcy or insolvency. It ought therefore to receive a liberal construction, to promote the remedy in favour of the bona fide creditor. Here the debt arose for goods sold and delivered in the course of trade; which is one of the cases provided for by the statute; and the defendant was ignorant of the secret act of bankruptcy committed by *Wardell* when he received payment of his debt. If he had received it from *Wardell* without the compulsion of process, no doubt the payment would have been protected: and the sanction of a court of justice ought not to invalidate it. Payments by compulsion of process have been holden to be within the act in several cases. *Calvert and Others, Assignees of Jones, v. Linguard and Sadler*, (b) *Holmes and Another, Assignees of M^d Dougal, v. Wennington*, (c) and, finally, in *Cox v. Morgan*, 2 Bos. & Pull. 396, by a majority of the Court, after full consideration. [Lord *Ellenborough*, C. J. adverted to the ground on which *Chambre*, J. had differed in that case, that so far from being a payment "in the usual and ordinary course of trade and dealing," as the statute requires, it was the reverse: for the payment was obliged to be compelled, because it could not be obtained in the usual and ordinary course. And he added, that it was by no means a clear case.] He then adverted to the arguments of the two other Judges in that case in support of the payment. Then, if payment under an arrest be within the statute, payment under a judgment

(a) Vide *Philpot v. Corden*, 5 Term Rep. 287.

(b) Sittings before Lord *Loughborough*, in 1783, cited in *Bradley v. Clark*, 5 Term Rep. 200, and also in 2 H. Blac. 335, and said by *Rooke*, J. in *Cox v. Morgan*, 2 Bos. & Pull. 411, to have been afterwards heard in *C. B.* upon a motion for a new trial.

(c) Cited 5 Term Rep. 200, and a full note of it in 2 Bos. & Pull. 399.

and execution cannot be less so, without introducing the greatest absurdity and incongruity in the proceedings of the law. Even upon the words of the act a payment enforced by legal process cannot be said to be *unusual and extraordinary*; and if this be not within the act, it will be difficult to draw the line: a menace of process may equally be said to take the payment which ensues upon it out of the *usual and ordinary course*, &c. and questions will arise whether the terms, the tone, or occasion of the demand imply a menace, till the act be frittered away. And at least, it is clear that the stat. 21 Jac. 1. c. 19. s. 9, which says, "that all creditors having *security* for their debts by judgment, &c. or having made attachments in *London*, &c. whereof there is *no execution*, &c. served and executed before the party shall become bankrupt, &c. shall not be relieved upon any such judgment, attachment, &c. for more than a rateable part of their debts with the other creditors," does not apply; for as that does not extend to judgments upon which executions have been executed, which cannot be overhauled by the assignees of the debtor under a commission sued out upon a prior act of bankruptcy, *Foster v. Allanson*, 2 Term Rep. 479; so neither, by a parity of reason, can it be extended to judgments upon which the debts have been paid without any writ of execution: for in neither case can it be said that the judgment remains as a security. None of the cases apply where the payments were ruled to be out of the statute of Geo. 2. *Bradley v. Clarke*, 5 Term Rep. 197, was a payment for the carriage of goods, not for the goods themselves. In *Vernon v. Hall*(a) time had been given on the bill of exchange, which converted it into a loan. And in *Hunter v. Potts*, 4 Term Rep. 182, and *Sill v. Worswick*, 1 H. Blac. 665, the creditors who received payments were cognizant of the bankruptcy of their debtors. And perhaps in all cases where a commission has been taken out, notice of which is always inserted in the *Gazette*, the creditors of the bankrupt may be bound to take notice of it. [Lord *Ellenborough*, C. J. That is a circumstance from whence the jury may presume notice, but it is not in itself actual notice.] The several cases of *Solomons v. Ross*,(b) *Jollet v. Deponthien*,(c) and *Neal v. Cottingham*,(d) appear to have turned on the circumstance of the payments having been made after the commissions sued out. On the second point he waived offering any argument, after the opinion which the Court had intimated.

Sedgwick, in reply, said that the payment had been made, *not by the bankrupt*, but by a third person: not out of the *bankrupt's* money, but out of the money of the *assignees*; and not in the usual and ordinary course of trade and dealing, but under compulsion of process; and therefore was in no respect within the words or meaning of the statute.

LORD ELLENBOROUGH, C. J. I think the observation, that this was not a payment *by the bankrupt* at all, is decisive; for the words of the statute are, that no creditor "shall be liable to refund to the assignees any money which before the issuing of the commission was really and *bona fide*, and in the usual and ordinary course of trade and dealing, received by such person of any such bankrupt before such time," &c. If it had been necessary to have decided the question on which the Court of Common Pleas were divided in opinion, in the case of *Cox v. Morgan*, I should have wished to have taken more time to consider it, especially as the opinion of the majority of that Court is fortified by antecedent cases; though I confess that, at first sight of the statute, I should be more inclined to the construction put upon it by the single Judge. But there is no necessity for us to determine whether that case were rightly decided by the majority. For whether or not money received by a creditor under the compulsion of process can or cannot be said to be received by him *in the usual and ordinary course of trade and dealing*, at least it must be received of *the bankrupt* to bring the case within the statute;

(a) 2 Term Rep. 648 and vide *Pinkerton v. Marshall*, 2 H. Blac. 334.

(b) Cited in *Folliott v. Ogden*, 1 H. Blac. 131. (c) *Ib.* 132. (d) *Ib.*

the payment must be made by the bankrupt, or if not by his individual hand, at least by some agent of his, acting by his authority. But how can a payment extorted by compulsion of legal process, from one who happened to have effects of the bankrupt in his hands at the time, be said to be a payment *by the bankrupt*, who was not even conscious of the fact? Therefore, without going more at large into the question, it is sufficient to dispose of this case by saying, that it neither comes within the words nor the meaning of the statute.(1)

LAWRENCE, J.(a) This cannot be said to be a payment *by the bankrupt*, even under the compulsion of process; for the bankrupt could not even know that the money belonging to him, was in the hands of the person at the time by whom the payment was in fact made.

LE BLANC, J. This is very different from cases of payments made by a person entrusted by the bankrupt with the disposition of his property, or by his direction, which may be considered as payments made by him in the usual and ordinary course of trade and dealing. But it is very difficult to say, that a payment made by a third person, without the knowledge of the bankrupt, without his even knowing that his property was in the hands of such third person, is a payment, in the usual and ordinary course of trade and dealing, by the bankrupt himself.

Postea to the plaintiffs.(b)

Hovil and Others, Assignees, &c. of Wardell, a Bankrupt, v. Pack and Another.

7 East, 164. Jan. 31, 1806.

A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account, as collateral security. And after notice of a loss upon those policies, the policy broker, at the bankrupt's request, gives his own acceptance to the defendants, (which was afterwards paid) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy: held that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt, though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands.

ASSUMPSIT for money had and received by the defendants for the use of the plaintiffs, as assignees of *Wardell*, the bankrupt. Plea, *non assumpsit*. At the trial before Lord *Ellenborough*, C. J. at the Sittings at *Guildhall* after last *Trinity* term, a verdict was found for the plaintiffs for 230*l.*, subject to the opinion of the Court upon the following case.

In *November 1802* *Wardell*, being a trader, indorsed a bill of exchange, which would become due on the 8th of *Feb.* 1803, and which, in *Dec.* 1802, was indorsed over to the defendants for a valuable consideration. On the 27th of *Jan.* 1803, *Wardell* sailed in a ship, of which he was the sole owner, with a cargo for the *West Indies*, having only a few days before committed a secret act of bankruptcy. The bill was refused payment when due, and notice thereof given to the proper parties. In *July* 1803, the bankrupt's wife caused insurances to the amount of 3400*l.* on the ship and cargo to be effected for the bankrupt by Mr. *De Beaume*, a policy broker residing in *London*, and who delivered them to Mrs. *Wardell* without being paid the premiums. Mrs. *Wardell* soon afterwards applied to the defendants, whose debt was still un-

(1) Vide *Harwood v. Lomas*, 11 East, 127.

(a) *Grose*, J. was absent from indisposition.

(b) See the next case.

paid, and who had brought an action against the drawer of the bill above-mentioned, and obtained judgment by confession in such action, to take another bill for payment of the amount of the first, which she indorsed as attorney for her husband, and to stay execution until such second bill should become due: and as an inducement to them to do so, offered to deposit the policies with them as a security for the payment of such second bill. This the defendant agreed to, and the policies were accordingly deposited with them. In July 1803, the ship and cargo were captured by the French. On receiving intelligence of the capture, Mrs. Wardell applied to the defendants to deliver up the policies, for the purpose of receiving the amount of the subscription; which they refusing to do without security for payment of their debt, (the second bill having also been dishonoured,) *De Beaume*, at her request, accepted a bill of exchange at one month for 230*l.*, the amount of the defendants' debt; and the policies upon this were, at the request of Mrs. Wardell, delivered up to him. This bill was regularly paid when due by Mr. *De Beaume*, who had received the amount of the policies of insurance from the underwriters. The bankrupt returned to England in February 1804; and on the 9th of March following, a commission of bankrupt was issued against him, under which the plaintiffs were chosen assignees, and an assignment to them was regularly executed. *De Beaume* retained from the plaintiffs as assignees, out of the monies he had collected on the policies, the amount of the payment he had made to the defendants. Wardell had been a bankrupt twice before, once in the year 1786, and again in 1788, and had obtained his certificate under each of those commissions, but had not paid a dividend of 15*s.* in the pound under the last, and his creditors at that time still remain unsatisfied. The question for the opinion of the Court was, Whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; if not, a nonsuit was to be entered.

Sedgwick, for the plaintiffs, conceived that the determination in the last case in favour of the plaintiffs' right to sue, which had been abandoned in argument, concluded the present question. But by

LORD ELLENBOROUGH, C. J. If you adopt *De Beaume* as your agent on your own behalf, you must adopt him throughout, and take his agency *cum onere*. Your action, if any, must be against *De Beaume*; but it is impossible you can follow the money into the hands of the defendant, to whom it has been paid by your adopted agent. If this could be done, by the same rule you might follow it still further through other hands. But if the defendants had paid it over to another, could you pretend to have the same right to follow it?

LAWRENCE, J. (a) The facts are, that the defendants having a demand upon the bankrupt upon a certain bill, his wife prevailed upon them to give it up, and to take another bill for the amount, and deposited the policies of insurance, which she had procured from *De Beaume*, in their hands as a security. When she applied to them to deliver up the policies, for the purpose of obtaining payment from the underwriters, they refused unless upon receiving security for the payment of their debt. This security was given by *De Beaume's* acceptance, which he afterwards paid: the money, therefore, which the defendants have received, and for which the assignees of the bankrupt have brought this action, was the money of *De Beaume*, and not of the bankrupt; and therefore the assignees can have no title to recover it.

LA BLANC, J. *De Beaume* must have paid his acceptance to the defendants, whether he had ever received the amount of the loss on the policies from the underwriters or not. The payment therefore was made by him out of his own money.

Gaselee was to have argued for the defendants.

Postea to the Defendants.

(a) *Grose*, J. was absent from indisposition.

The King v. The Inhabitants of Mersham.

7 East, 167. Feb. 1, 1806.

The appointment of a master of a work-house by the parish officers and vestry, pursuant to the stat. 9 Geo. 1. c. 7, which enables the parish officers and parishioners, &c. to contract with any person for the management of the poor in the work-house, and who did contract with the pauper to manage the poor in the work-house, and teach the children to spin, &c. at a yearly salary, and after some years' service, dismissed him at a quarter's notice, is not a *public annual office or charge* within the stat. 3 W. & M. c. 11. s. 6, the executing of which for a year will confer a settlement.

TWO justices by an order removed *Rd. Wraith*, his wife and children by name, from the parish of *Boxley* to the parish of *Mersham*, both in the county of *Kent*. The Sessions, on appeal, confirmed the order; subject to the opinion of this Court on the following case.

Previous to the year 1800, the pauper's settlement was at *Mersham*. Some time in that year, being informed that a master of the workhouse in the parish of *Boxley* was wanted, he applied for that appointment, and was desired to send in his proposals, and a certificate of his character, to the weekly vestry of the parish. He attended at such vestry, and after some enquiries he was desired to retire, that his proposals might be considered. Shortly afterwards he was informed that his proposals were accepted, and his character approved of; and he was desired to attend a subsequent vestry to receive his appointment. He attended accordingly; but there being only a very small attendance of the inhabitants at that vestry, his appointment was postponed to a vestry to be holden on the following *Sunday*, when he attended; and there being twelve of the inhabitants present, he was informed by the parish officers that he was appointed master of the workhouse of the parish of *Boxley*, at a salary of 16*l.* per annum. Nothing was said, either at the time of his appointment or afterwards, as to the time for which he was to hold his situation; but the pauper conceived that he might at any time be dismissed at a quarter's notice. There was no appointment in writing, or any entry in the parish books. He continued master of the workhouse, and resided in the parish of *Boxley* four years, and during the fifth year was dismissed at a quarter's notice. The duties performed by the pauper were, the superintending and managing the poor in the workhouse, teaching the poor children to spin, weaving himself, and carrying on the manufactures. He carried the accounts quarterly to the overseers. The Sessions were of opinion that the pauper did not gain a settlement in the parish of *Boxley* in consequence of the appointment and service above mentioned.

Taddy, (and *Berens* was with him,) in support of the order of Sessions, contended that this was not an *office* within the words of the stat. 3 W. & M. c. 11. s. 6, the service of which within the parish could confer a settlement. The words are, that if any person shall "execute any *public and annual office or charge*" in the parish for one whole year, he shall gain a settlement. The word *office*, in its strict sense, being applicable to ancient appointments with a public trust annexed at common law; or such as are expressly made *offices* by act of parliament; and the word *charge* being used for such public appointments by statute as are in the nature of public *offices*, though not expressly declared to be so by name; but having public rights and public duties annexed by law for the breach of which the party is indictable, and not such as merely arise out of contract. It would be very strange and inconsistent, if a parish vestry could, by their contract with an individual, create a new office, which it is said in the books, *Walter Chase's case*, 12 Rep. 116. 2 Sid. 141, that the king himself cannot do. The cases wherein the service of offices has been holden to give settlements are either of common law offices, such as warden of a borough, 10 Mod. 13, parish clerk, Salk. 536; 2 Stra. 942; 2

Sess. Cas. 182; tithingman, Cas. of Set. & Rem. 72, constable, (a) borsholder, Burr. S. C. 223, bailiff or aleconner, Burr. S. C. 365, and sexton, 3 Term Rep. 118; or of officers appointed by statute with public duties to perform, for the due performance of which they are criminally responsible, such as collector of land-tax, 2 Const. 283, and collector of the duties on births and burials, 2 Const. 284, and 1 Stra. 211. Now the master of a work-house cannot be an officer at common law, because all the poor laws are within time of memory. If then he be an officer at all, it must be under one or other of the statutes 9 Geo. 1. c. 7. 4, or 22 Geo. 3. c. 83, both of which were commented upon in the case of *The King v. Ilminster*, 1 East, 83, where Lord *Kenyon*, upon the first statement of the case, was of opinion that the governor of the work-house was no more than in the nature of a servant to the parish-officers. But, upon the case going down to be re-stated, the Sessions precluded the general question by finding the fact that the pauper had served a public annual office in the parish for above a year. The argument in support of the settlement turned principally on the *notoriety* of the appointment, and of the service to be performed: but though that would have great weight to prove it a *public office*, if any office at all, yet it could not prove it to be an *office*.

The Court then wished to hear the other side: and Lord *Ellenborough*, C. J. asked whether this could be shewn to be any more than a private nomination of the parish officers? That, perhaps, the best criterion for determining whether this man were an *officer* was to consider whether he were indictable for the negligent discharge of the duty which he engaged to perform.

Pitcairn, contra. The pauper received his appointment from the vestry, with the consent of which he was appointed conformably to the direction of the stat. 9 G. 1. c. 7. s. 4: that would make it a public independent appointment: the duties to perform are as much of a public nature as those of the overseers of the poor: and the pauper having been appointed at a *yearly* salary, and the duration of his appointment not limited to a less period, it must be taken in point of law, as in the case of a general hiring, to have been an appointment for a year: and the pauper's apprehension can signify nothing. Then the question is, Whether this be not an *office* or *charge* within the meaning of the stat. 3 W. 3. c. 11. s. 6, so as to confer a settlement? If there were any technical meaning attached to the word *office*, at least there is none to the word *charge*; and at any rate, this must be deemed to be a *public charge within the parish*. [Ld. *Ellenborough*, C. J. asked if there were any case in which the words "public charge" had had a sense put upon them distinct from that of "public office."] There is no such case; but perhaps the word *charge* was introduced into the statute in order to meet any objection to the technical meaning of the word *office*: the principle of all the several modes of gaining settlements being the *notoriety* of the party's residence in the parish, which was deemed equivalent to express notice to the parish officers, the original mode of acquiring a settlement. Upon this principle it is that an enlarged construction has always been put upon the statute of King *William*, in not confining the word *office* to *parochial* offices; as in *Bisham v. Cook*, 2 Const. 284. 1 Stra. 411: and the principle of *notoriety* cannot apply stronger to any case than the present, where the parish collectively have appointed the pauper to execute a public charge in the parish.

LORD ELLENBOROUGH, C. J. The principle on which this mode of gaining a settlement has been given is undoubtedly *notoriety* to the parish, but a settlement can only be gained in this mode upon the terms of the act of parliament; namely, by executing "a public annual office or charge" in the parish: which brings us back to the question, Whether that which the pauper

(a) 2 Const. 285, where all these cases are collected.

was appointed to execute were a *public office or charge*? And it appears to me that he cannot be considered as a public officer. An *office* must be derived either immediately or mediately from the crown, or be constituted by statute; and this is neither one nor the other: but merely arising out of a *contract* with the parish, which the parish officers, with the consent of the parishioners, are by the statute enabled to make with any person for the maintenance and employment of the poor. And it might as well be said, that a nurse employed to look after the poor, or any other employed in the like manner to do any part of the parish business, is an officer. The question might admit of a different consideration if any distinction had been established between a public *office* and a public *charge*; but I can find no such distinction either in any adjudged case or in the sense of the statute. Then again, if this were to be considered as an office or charge, is it an *annual* office or charge? It is said that we are to draw the conclusion that it is so by analogy to constructive hirings for a year: but there are circumstances in this case which repel that presumption, independent of the apprehension of the pauper; for the appointment was determined at a quarter's notice, without objection. Therefore as far as we can collect the intended duration of the employment from the acts of the parties, it appears that the parish might put an end to it within the year, if they thought proper. Upon the whole, therefore, it neither appears to have been an office, nor a public office, nor a public annual office, within the statute; and it is immaterial which part of the definition fails in its application to this case.

LAWRENCE, J.(a) This pauper can only have gained a settlement in *Boxley* by doing that which the statute of King *William* points out as equivalent to notice to the parish. The statute specifies a particular act to be done, and no equivalent for that act will satisfy it; but the words of the statute must be pursued, and no notoriety of employment in the parish will confer a settlement, unless it be by executing a public annual office or charge in the parish. This is clearly no *office*, but only an *employment* arising out of a contract: between which and an office there is a great distinction: as appears from 2 Sid. 142, and *Rex v. Milburne*.(b) Then it is said, that this is a public *charge*; but I know not how we can distinguish that from a public *office* in this respect. It would be going a great way to say, that every contract with the parishioners for any purpose concerning the parish was a *public charge*; for that would extend to contracts with carpenters and masons for keeping the church in repair, and the like, which can never be considered to be within the meaning of the act. But the word *charge*, coupled as it is in the act with *office*, must be taken to mean something of the same kind, though it may not commonly be known under the name of an office.

LE BLANC, J. If this were to be deemed a public annual office or charge within the act, it would extend to every case where a person had a duty to perform which from its nature must be known to the parish in general. But there is a difference between an employment created by the parties themselves, which they may put an end to whenever they please, and that which exists or is created by law. Now this man was in the former situation. It was in the option of the overseers and parishioners to have such a person in such an employment or not; and they could put an end to the employment altogether whenever they pleased. It was created by themselves, and depended upon their contract. I cannot therefore call this an office or charge within the meaning of the act of parliament.

Both Orders confirmed.

(a) *Grose*, J. was absent from indisposition.

(b) 1 Wils. 87, and 2 Stra. 1225, where it was holden, that a schoolmaster gained no settlement by executing his employment, which was no office.

Moseley, Bart. v. Stonehouse.

7 East, 174. Feb. 4, 1806.

A certificate granted by a Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of parish and ward officers," exempts the party from serving the office of petty constable for a township within, but not co-extensive with the parish where the felony was committed, and for which the certificate was granted, to which office he was appointed at the court-leet of the manor co-extensive with such township.

IN debt for 20*l*. the plaintiff declared that he was seised in fee of the manor of *Manchester*, in the county of *Lancaster*, and that he, and all those whose estate he has, have from time immemorial had a court-leet or view of frankpledge of all the inhabitants and resiants within the manor, &c.; and that from time immemorial there has been a custom there that the inhabitants and resiants within the manor, charged and sworn to inquire and present those things which belong to the said court, &c. have yearly, at that court-leet, held within the manor, within a month next after *Michaelmas*, elected two fit persons of the inhabitants and resiants within the manor to be respectively constables of *Manchester*, &c. for the year then next following, who, if present, have been accustomed to be sworn in open court. The declaration then stated that at a court-leet holden within the manor, within one month, &c. viz. on the 1st of *October* 1804, the defendant and one *J. R.* who then and long before were inhabitants and resiants within the manor, being fit persons in that behalf, were elected to be constables of *Manchester* aforesaid for the year ensuing, &c.: that the defendant and *J. R.* were both present in court at the time of such election, and had notice thereof, &c.; but that the defendant, though requested, &c. refused to be sworn into the said office of constable, &c. Whereupon the steward imposed a reasonable fine of 20*l*. upon him for the use of the lord; of which the defendant had notice, and was required to pay the same, but refused, &c. Pleas, 1st, *Nil debet*. 2dly, *Actio non*, &c. because long before the election of the defendant to be one of the constables of *Manchester*, viz. at the assizes, &c. and gaol delivery at *Lancaster*, on the 15th of *August* 1801, before Lord *Alvanley*, &c. one *E. B.* was convicted of burglary, &c. in the dwelling-house of *Samuel Hall*, in the parish of *Manchester* in the said county: and that Lord *Alvanley*, before whom the conviction was had on the 24th of *August* 1801, at, &c. by his certificate under his hand, dated, &c., and which the defendant now brings here into court, did, pursuant to the statute in that case made, certify the said conviction in form aforesaid, and that the said *Samuel Hall*, and also *J. H.* and *W. W.* of the parish aforesaid, did apprehend and take the said *E. B.* and did prosecute her to conviction, &c.; and, pursuant to the stat. 10 & 11 W. 3. (c. 22,) the said Justice did further certify, that by virtue thereof and of the said statute, the said *S. Hall*, for the apprehension and conviction aforesaid, was thereby declared to be discharged of and from all and all manner of PARISH OFFICES within the PARISH of *Manchester* aforesaid, as by the said certificate appears, which is duly inrolled of record at the general court of quarter sessions, &c. as in and by the said statute required. The plea then stated, that before such election, &c. the said *S. Hall*, by indenture, &c. assigned the said certificate to the defendant for 35*l*. in pursuance of the power given to him by the statute: and averred, that before such assignment *S. Hall* had made no use of the certificate to exempt himself from any parish or ward office; and that the said *S. Hall* who made the assignment to the defendant and the *Sam. Hall* named in the certificate are the same. The plea then further stated, that the parish of *Manchester* in the certificate mentioned from time immemorial has been and is still divided into and contains divers distinct townships, one of which is the township of *Manchester*, and that the said manor of *Manchester* and the said

townships of Manchester from time immemorial have been and still are *co-extensive* and *wholly within the said parish of Manchester*, and that the said election of the defendant to be a constable of *Manchester*, as in the declaration mentioned, was an election of him to be a constable of the *township of Manchester*, being a *parish office within the said township of Manchester*, wherein the felony was committed as aforesaid, to wit, at, &c. whereby and by force of the statute, the defendant, at the time of such election, was and is exempt and discharged from the said office of constable, to which he was so elected as aforesaid, so being a *parish office within the said parish of Manchester*, to wit, at, &c.—

Replication to the second plea, that the parish of *Manchester* in the certificate mentioned from time immemorial has been divided into and contains divers distinct townships, one of such being the township of *Manchester*, and that the manor of *M.* and the township of *M.* are co-extensive, and that the several and respective townships in the parish of *M.* during all the time aforesaid have been used and accustomed, and still of right ought to have several and respective constables for each township, wholly distinct and independent of each other; and that every person who has been elected to serve the office of constable within or for any of the said respective townships have served and exercised the office of constable within and for that township only for which such person was so elected constable; and that no person who, during all or any part of the time aforesaid, has been elected to serve the office of constable within or for any of the said respective townships, has served or exercised the office of constable within or for the said parish of *Manchester* at large, or any where within the said parish of *Manchester* out of the respective townships for which he was elected constable. That the election of the defendant to be a constable of *Manchester*, as in the declaration mentioned, was an election of him to be a constable of the *township of Manchester* aforesaid; and that the defendant, by virtue of that election, was confined to serve and exercise the said office of constable within the said *township of M.*, and ought not to, nor could, by virtue of that election, serve or exercise the office within or for the said *parish of M.* at large, or any where within the said *parish of M.*, except within the *township of M. aforesaid*; without this, that the said office of constable, to which the defendant was so elected, was a *parish office within the said parish of M. &c.* To this there was a general demurrer, and joinder.

Wood, in support of the demurrer. The question is, Whether the certificate exempts the defendant from serving the office of constable in the *township of Manchester*, the whole of which is within the parish of *Manchester*? The statute giving the certificate is the 10 & 11 W. 3. c. 23. s. 2, which discharges the proprietor thereof "from all and all manner of *parish and ward* offices within the parish or ward wherein the felony shall be committed." &c. The only case in the books on the construction of the act is *Rex v. Derbyshire*, 2 Burr. 1182, which differs from the present; for there the manor of *Birmingham*, for which the defendant was appointed constable, was more extensive than the parish of *Birmingham*, for which the certificate was granted; and therefore the certificate was holden not to exempt him from serving the office; and rightly so; for otherwise it would have had the effect of extending the privilege meant to be conferred by the statute to a district without the parish or ward wherein the felony was committed; which is contrary to the words of the act. But the Court admitted that a constable whose jurisdiction did not extend beyond the parish might be considered as a *parish officer* within the act. [Lord *Ellenborough* having asked if he had found any case of an appointment of a constable for a *parish, eo nomine*,] he answered, that he was not aware of any. But he urged, that if an appointment to a parish office for a district less than a parish, though within the boundary of it, were deemed not to be within the privilege of the statute, it would be rendered nugatory in the North of *England*, where most of the parishes are divided into townships which have separate overseers, and where there are no over-

seers for the *parishes, eo nomine*. (It was observed, contra, that *churchwardens* were appointed for the whole parish.) In some places there are only chapel wardens for the several townships; and in like manner the surveyors of the highways are appointed for the townships. The statute 10 & 11 W. 3, certainly meant to use the words *parish officers* in their popular acceptation, including overseers of the poor, whether appointed for *townships* or *parishes, constables, &c.*, though in strictness these latter may not be parish officers, as not deriving their title from any parochial appointment.^(a) And in several other acts the Legislature appear to have classed *constables* with *parish officers*, as commonly so considered. As in st. 13 and 14 Car. 2. c. 12. s. 12., which speaks of constables, &c. dying or going out of the parish: and s. 16, which speaks of the constable, &c. of every parish. So st. 18 Geo. 3. c. 19, which speaks of constables, headboroughs, and tithingmen doing the business of their parish, township, or place, and delivering their accounts to the overseers of the poor of the said parish, &c.

Littledale, contra. The constable of a township, who has no jurisdiction in the rest of the parish out of the township, cannot be considered as a *parish officer*; which word *parish* is used in the statute as an adjective, qualifying the term *officer*, to which it is annexed, to mean an office co-extensive with the parish; as *county magistrate, county rate, county treasurer, &c.* are used in opposition to *city or borough magistrate, &c.* So *sheriff*, which is *shire-reeve, port-reeve, &c.*, mean that the officer's jurisdiction is co-extensive with the place which is used as the adjunct to his office. The legislature having given a particular privilege, it cannot be extended beyond the words of the act: and the locality of the word *parish*, as there used, is further evinced by its being coupled with *ward*, which is a local district in a *city* as *parish* is in a *county*. [Lord *Ellenborough*. Does not *ward* in a city correspond with hundred in a *county*; as in *London* the parishes are within the wards.^(b)] If ward be a higher division than a parish, it would not shew that the latter meant to include a lower division as a township. The act meant to give an exemption co-extensive with the whole parish, for it applies to felonies committed within any part of the parish; and it would be contradictory to give it any other construction. The stat. 5 Ann. c. 31. s. 1, which is auxiliary to the statute of King *William*, gives 40*l.* reward on conviction of a house-breaker, and directs the judge to certify in what parish the felony was committed. The case of parishes divided into townships is a *casus omissus* in this act, as it was in the general statute of the 43 Eliz. c. 2, which omission was afterwards supplied by the stat. 13 & 14 Car. 2. c. 12. [*Le Blanc*, J. observed, that the overseers of the poor of townships in the North had always had the benefit of this statute of King *William*.] The principle laid down in *Rez v. Darbyshire*, 2 Burr. 1182, was, that the officer claiming the exemption should at least claim it for an office co-extensive with the parish: and they considered that a constable was a civil officer, the nature of whose office had no relation to a *parish*, which is an ecclesiastical division. [*Le Blanc*, J. Supposing the parish and manor co-extensive, would that vary the question?] In one sense it might, as the legislature looked to the locality of the exemption.

Wood in reply. A *parish office within the parish* does not necessarily mean an office co-extensive with the parish, but may be taken to mean one which

(a) Upon the subject of the appointment of constables, vide 1 Blac. Com. 355, *Rez v. Stephens*, T. Jones, 212. Comb. 20. 1 Roll. Abr. 535. 1. The constable of *Stepney's* case, 1 Bulst. 174.

(b) Ward is said to be so used in *Braddish v. Bishop*, Cro. Eliz. 260, and also in Cro. Car. 165. But in Cro. Jac. 222, it is said to be used for a parish. According to *Cowell's Interpreter*, *Ward* is a portion of a city under the charge or keeping of an officer; as the wards of the city of *London* under the charge of the respective aldermen. It is also used as a portion of a forest. *Wapentake* is the same as hundred.

relates to the exercise of parochial duties within any part of the parish: and it would be a strange construction of the act to say, that if a township were co-extensive with the parish, which is sometimes the case, a certificate would exempt the owner from the offices of the township, but not otherwise. The legislature could never have contemplated so unmeaning a distinction. On the contrary, they meant to exempt the party from all offices to be exercised within the *parish* or *ward*. [*Grose*, J. observed, that there were ward officers as well as parish officers.] *Ward* in the counties of *Cumberland* and *Northumberland* signifies the same as *hundred* in other counties.

LORD ELLENBOROUGH, C. J. The question is, whether the office of constable for the manor and township of *Manchester*, which are co-extensive, and within the parish of *Manchester*, which parish contains also other townships, is a *parish* or *ward office* within the meaning of the stat. 10 & 11 W. 3. c. 23, from serving which the defendant is exempt by means of the certificate obtained by him under that act? And that depends upon the construction of the words exempting the original proprietor or assignee of such a certificate "from *all* and *all manner* of *parish* and ward offices, *within the parish* or *ward*" wherein the felony shall have been committed: whether those words shall receive a liberal and popular, or a strict and literal interpretation? If the words be construed strictly and literally, the office of petty constable must be excluded altogether: for constables are either appointed at the manor court or hundred court, either for the manor or vill, or for the hundred, and not for a *parish*, *eo nomine*: and so of overseers of the poor in the North of *England*, who are for the most part appointed, not for parishes, but for townships: and yet ever since the passing of the act of King *William* the exemption of the certificate has always been considered as extending to these. If then we cannot satisfy the apparent intention of the act by a strict and literal construction of the words, we must adopt the more liberal and popular sense in which they appear to have been used. And the legislature, in other instances which were mentioned at the bar, have spoken of constables as of *parish* officers, in the popular sense of the word *parish*, meaning thereby officers' whose functions were exercised *within* the parish: and unless we consider them to have used it in that sense in the stat. of King *William*, a very large portion of the realm must be deprived of the full benefit of it. The statute says, that the party shall be discharged "from *all* and *all manner* of parish and ward offices," as if contemplating something beyond what in legal strictness might be deemed to be a *parish* or *ward office*; but it does not specify any by name. If therefore we were to supply the mention of such offices only as in legal strictness fell under this description, we should only read "surveyors of highways of *parishes*, churchwardens, and overseers of the poor of *parishes*;" and considering *ward* as *hundred*, it would only embrace *high* constables: all other constables would be excluded, and all officers of townships. But it is impossible that this could have been the meaning of the legislature. In a case therefore where inconvenience would result from a narrower and strict interpretation of the words, which would in a great measure defeat the apparent object of the legislature, we must adopt the more general and popular sense of them, which the legislature have themselves applied to parish offices on other occasions.

Grose, J. In construing the words of this statute we must consider what was the object of the legislature in making this provision. They meant to encourage and reward persons who exerted themselves for the public good in the apprehension and conviction of certain offenders, by exempting them from the burthen of serving what they describe as "all and all manner of parish and ward offices." It is proper, therefore, in construing these words, to put the most beneficial sense upon them for the subject which they will admit of; and for this purpose we may fairly consider what has been the common language of the legislature in other acts in speaking of parish officers: and in the two which have been mentioned they have considered *constables* as *parish* officers.

It appears then, that they have sometimes used the appellation of *parish officers* in its common and popular sense; and therefore we may fairly consider, that in the present instance they meant to use it in that sense, and that they meant to exempt the owner of a certificate circumstanced as the defendant is from serving (amongst others) the office of constable, considering that as a parish office.

LAWRENCE, J. I think that this act, which was meant to encourage the apprehension and conviction of certain offenders, was intended to have a general operation throughout every part of the kingdom, and ought not to be narrowed by a construction which would exclude a considerable part of the North from the benefit of it. Considering then the object of the legislature, and the general terms they have used, it cannot be doubted that they meant to use them in their popular, and not in their strict sense. Constables are appointed either at the sheriff's tourn, or at the court-leet of the lord, and cannot therefore in strictness be deemed *parish officers*; but yet they are commonly so considered, and in the two acts which have been mentioned they are described as such: from whence we may infer, that the legislature, in the present instance, used the term "*parish office*" in the same popular sense. And not only the legislature in these acts of parliament, but writers of considerable eminence, have considered constables as parish officers. Thus *Lambert* in his *Office of Constable*, p. 9, speaks of petty constables in towns and *parishes*, who were to aid the constables of the hundred. And *Blackstone* in his *Commentaries*, 1 vol. 356, says, "petty constables are inferior officers in every town and *parish*, subordinate to the high constable of the hundred:" these, he says, are all chosen at the court-leet, or if no court-leet be held, are appointed by two justices of the peace. Considering therefore that the legislature has used the description of *parish officer* in its popular, and not in its strict sense, there is no reason for confining it to officers who are properly appointed for the whole parish, and whose jurisdiction is co-extensive with it, but it may well be taken to comprehend officers of the same description appointed to exercise their offices in different parts of the parish, all of whom together may be considered in a general sense as the parish officers, though each may not exercise a jurisdiction over the whole parish. This differs from the case of *Rex v. Darbyshire*, to which the true answer was given at the bar. The object of the act of King *William* in giving the certificate, was to exempt the possessor from the burthen of serving offices within the parish where the felony was committed, but not to extend the exemption to offices of more enlarged jurisdiction than the parish, which was the attempt made in that case, and therefore it cannot rule the present, which is an attempt to narrow the exemption to offices co-extensive with the whole parish.

LE BLANC, J. The question is, in what sense the legislature have used the term *parish offices* in this act of parliament, whether in its strict legal and technical sense, or in the more popular sense of it? And I know of no better rule for ascertaining in what sense words have been used in an act of parliament, than by seeing in what sense the same expressions have been used in other acts of parliament passed at no great distance of time from the act in question. Now in the act of Car. 2, it appears that a *constable* was considered by the legislature as a *parish officer*, and if the meaning of the act of King *William* were only doubtful, ought not such a construction to be put upon it as will extend its operation over the whole kingdom, rather than one which would deprive a great part of the kingdom of the benefit of it? It is not disputed, that if the manor and parish were co-extensive, the certificate would exempt the party from serving the office of constable. But that is going a great way towards the adoption of a liberal construction of the act. And if that were admitted, as I think it must be, it will be doing no violence to the words to extend the exemption to a constable who is appointed to execute his office within the limits of the parish for which the certificate is granted. In the case of *The*

King v. Darbyshire most of the arguments of the judges went to shew that the certificate did not extend to offices to be exercised *beyond* the bounds of the parish, as that would be to extend the exemption into a different district than that in which the party had the required merit, which must be confined to the parish wherein the felony was committed. But this case is the converse of that; for the exemption is claimed to be exercised within a less extent than the legislature proposed as the reward of the public service performed by the party, but one which is comprehended within the proposed extent. I am therefore of opinion, that the certificate does exempt the defendant from serving the office of constable for the township of *Manchester*, the whole of which lies within the parish of *Manchester*, for which such certificate was granted.

Judgment for the Defendant.

Zouch, on the Demise of Thomas Forse, v. Henry Forse.

7 East, 186. Feb. 4, 1806.

There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 Car. 2. c. 3. s. 12, and 14 Geo. 2. c. 20. s. 9, appropriating estates *pur autre vie* where there is no special occupant do not extend to copyholds. And one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord.

IN ejectment for one moiety of a copyhold tenement in the manor of *Froom Vanchurch*, in the county of *Dorset*, which was tried before *Le Blanc*, J. at the last *Dorchester* assizes, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

At the court baron of the Duke of *Bolton* for his manor of *Froom Vanchurch*, in the county of *Dorset*, holden the 24th of *July* 1761, the lord of the manor, by his steward, granted to *Robert Forse* the reversion of a moiety of a copyhold tenement by copy of court-roll as follows: "At this court the lord of the manor, by his steward, granted to *Robert Forse* of *Porton*, &c. the reversion of a moiety of a customary tenement and 46 acres of land, &c. within this manor, now in possession of *William Forse*, which he claims to hold for his life by copy of court-roll of this manor, dated the 29th of *April* 1725, remainder by another copy dated the 6th of *May* 1740, to *Henry Forse*, son of the said *William Forse*, for his life; to have and to hold the reversion of the said premises, &c. to the said *Robert Forse*, for the life of *Henry Forse*, his son, (aged ten years,) at the will of the lord, according to the custom of the said manor, from and immediately after the surrenders, forfeitures, or other determination of the estates of the said *William Forse*, and *Henry Forse* his son, of and in the said premises; paying the yearly rent of 15s. and an heriot, when it shall happen, and by and under such other works, suits, &c. services, and customs as are usually done and paid for the same. And for such estate in reversion the said *Robert Forse* (as sole purchaser) paid the lord for a fine 38l. But the admittance and fealty of the said *Robert Forse*, and *Henry Forse* his son, is respited until," &c. *William Forse* continued seised till the year 1764, when he died: and upon his death, the said *Henry Forse*, the son of *William Forse*, entered into and continued seised till 1793, when he died; and upon his death, his widow entered and continued in possession till 1803, when she died. The above-named *Robert Forse*, to whom the reversion was so granted, died intestate in 1775, leaving six sons, *William Forse* the eldest, *Henry* the *cestuy que vie* named in the said grant, *Thomas Forse* the lessor of the plaintiff, and three others; and upon his death administration of his effects was duly granted to two persons who are since dead: after which, viz. *February* 1st, 1804, administration *de*

bonis non was granted to the lessor of the plaintiff, who on the 25th of August 1804, was admitted tenant(a) to the said moiety for the life of the said *Henry Forse*, the son of *Robert Forse*. No evidence was produced of any custom in the manor that the cestuy que vies not taking by the habendum should have any beneficial interest. The question for the opinion of the Court was, whether the plaintiff were entitled to recover?

W. P. Taunton, for the lessor of the plaintiff, contended for his right to recover either under the original grant of the 24th of July 1761; and this either at common law, or by virtue of the statutes; or in equity; this being so plain a trust that the lessor of the plaintiff shall not be defeated on his trustee's title: or under the subsequent act of the lord in the admission of the 24th of August 1804, operating as a new copyhold grant to the lessor of the plaintiff *pur autre vie*, and re-uniting the legal with the equitable estate. 1st, The lessor is entitled to recover at common law as quasi a special occupant impliedly designated by the terms of the original grant: because every grant is to be taken most strongly against the grantor, and so to be construed *ut res magis valeat quam pereat*; and a copyhold grant to one *pur autre vie* is equivalent to a grant to him and his representatives *pur autre vie*, and is not determined by the death of the grantee; for as he may assign it during the life of the cestuy que vie, and the lord would be bound to admit the assignee in fact, by the same reason he ought to admit the administrator of his grantee, who is an assignee in law, in order to give effect to the grant. [*Le Blanc, J.* Is it not settled law, that there can be no occupancy of a copyhold?] Co. Cop. s. 56, says, that there may, though it is said in *Smartle v. Penhallow*(b) to have been adjudged otherwise. But it is laid down in many authorities(c) that a copyhold grant is to be construed according to the intent of the parties, and is not to be tied up to the strict rules of law. And here the intent of the lord plainly appears, that an estate for the whole life of *Henry Forse* should pass to the grantee. But if there were any doubt, the subsequent admission of the lessor of the plaintiff by the lord has explained his own grant, which it may well do, as the admittance in *Brookes v. Brookes*, Poph. 125, explained the antecedent surrender; especially as the admittance in this case was made on a claim of right as administrator of *Robert Forse*. So in *Burgess v. Wheate*, 1 Blac. Rep. 167, Lord Mansfield said, that if the lord consent to a condition or trust on the court roll, he is bound by it; for he cannot claim against his own act. And as a grant of a chattel interest in land to *A.* for the life of *B.* would enure in law as a grant to *A.* and his personal representatives, though not named, during the life of *B.*; so this which is a grant of a bare interest in land, under which the freehold does not pass to the grantee, must operate as a grant to the administrator of the grantee, in order to give effect to it; and the intention of the lord that it should so operate is evinced by the subsequent admission of the administrator, as such. But supposing the grant would have determined at common law by the death of the grantee, the statutes 29 Car. 2. c. 3. s. 12, and 14 Geo. 2. c. 20. s. 9, will uphold the estate in his representative for the life of the cestuy que vie. The first statute enacts, that any estate *pur autre vie* shall be deviseable, and if not devised shall be chargeable in the hands of the heir, if it come to him

(a) The admission, upon which an argument was afterwards attempted to be raised, was in this form: "Manor of *Froom Vanchurch, &c.* At this court came *Thomas Forse* of, &c. and was admitted tenant to a moiety of a customary tenement and 46 acres of land, &c. which he claims as administrator of the goods, &c. of *Robert Forse*, late of *Porton, &c.* deceased, for the life of *Henry Forse*, by copy of court-roll of this manor, dated 24th of July 1761; it appearing by the said copy, that the said *Robert Forse* was the sole purchaser thereof; and the said *Thomas Forse* did this day his fealty to the lady."

(b) *Smartle v. Penhallow*, 6 Mod. 65. 1 Salk. 188, and 2 Ld. Ray. 994.

(c) Co. Cop. s. 35. (p. 97.) *Fisher v. Wigg*, 1 P. Wms. 15. *Rigden v. Vallier*, 2 Ves. 256, 9. *Brooks v. Brooks*, Poph. 125. Cro. Jac. 434.

as special occupant, as assets by descent; and if there be no special occupant, it shall go to the executors or administrators of the grantee, and be assets in their hands: and the latter statute directs, that where there is no devise of such estate, and no special occupant, the surplus of such estate, after payment of debts, shall be distributed as the personal estate of the owner. Then supposing there could be no general occupant of a copyhold, which never appears to have been expressly decided; (for it was not the principal point in *Smartle v. Penhallow*, 6 Mod. 65, 1 Salk. 188, and 2 Ld. Ray. 994; and *Coke's Copyholder*, s. 56, is otherwise,) that is no reason why there may not be a special occupant of it under the statutes: for at common law there could be no general occupancy of things lying in grant as of a rent; (a) and yet the statutes extend to them. This is said in a note to 6 Mod. 66, to have been so adjudged in *C. B.*; and though a *quære* be there put, the point was expressly determined by Lord *Harcourt* in *Raebinson v. The Duchess of Montague*, (b) who said, that if since the stat. of Car. 2, a rent be granted to A. for the life of B., and A. die, leaving B.; A.'s executors or administrators shall have it during the life of B.; and the statute, he adds, in that case does not enlarge, but only preserves the estate of the grantee. And so is the opinion in *Kendal v. Micfield*, Barnard. Chan. Rep. 49. The same reason holds why copyhold should be preserved as well as other estates for life. There are several cases in equity where copyhold estates *pur autre vie* have gone to the personal representatives of the grantor. *How v. How*, 1 Vern. 416; *Withers v. Withers*, Ambler 152, and *Rundle v. Rundle*, 2 Vern. 264. [Lawrence, J. Were not those cases of special occupancy? But have you any cases of common occupancy where it was holden that the representatives of the grantee should take against the lord? In *Withers v. Withers*, Lord *Hardwicke* considered that the stat. 14 Geo. 2. c. 20, did not extend to copyholds.] He admitted, that he had not found any such case. But what was said in *Ambler* is but a loose *dictum*. At any rate, he contended, 3dly, that by the admission of the 24th of August 1804, the lord, who had then the legal title, made a new and valid customary grant, Co. Cop. s. 38, of the copyhold to the lessor of the plaintiff, and thereby united the legal with the equitable title which the lessor had in him before. [Lord *Ellenborough*. If a stranger have no title, can admission give him a title? *Lawrence, J.* and *Le Blanc, J.* If the lord admit one upon a mistaken claim, which turns out to have no foundation, how can that pass the estate to him? Lord *Ellenborough*. Have you any case where an admission upon an unfounded claim shall operate as a new and effectual grant from the lord? At least it may operate so far as to pass to him the legal title which before was in the lord; and, according to 3 Leon. 210, which is recognized in *Gilbert's Tenures*, 281, the stranger shall be tenant at will, because he comes in by the assent of the lord. As in *Doe d. Martin v. Watts*, 7 Term Rep. 85, an acceptance of rent, through ignorance of the party's title, will yet constitute a tenancy from year to year.

LORD ELLENBOROUGH, C. J. That was in the case of a tenant in possession: but an admittance to a copyhold does not in itself constitute a possession: it only gives the party the means of possession, if he have a good title to it. Nothing can be added further to the argument, and therefore we may relieve the plaintiff's counsel from further unnecessary trouble. The claim made by the lessor of the plaintiff was as *administrator de bonis non* of *Robert Forse* the grantee, upon which he was admitted; but in that character he could not be invested with any title, unless copyholds be within the statute of Car. 2, or of Geo. 2. But it having been decided that neither of those statutes extends to copyholds, it appears that he claims to be admitted in a character upon which no legal title could be founded, and in respect of which he

(a) Co. Lit. 41. Vaugh. 190. 201. 2 Roll. Abr. 150. Cro. Eliz. 721. Salk. 189. 2 Ld. Ray. 1000.

(b) December 1710, note to *Low v. Burrow*, 3 P. Wms. 260.

ought not to have been admitted. Then unless this erroneous admission operate as a new grant, he can have no title at all. But it would be too much to say, that that which was an admission upon a claim in a particular character, being vicious in that respect, shall operate as a new and express grant which neither the lord nor the tenant ever contemplated at the time.

LAWRENCE, J. It never was determined that copyholds were within the statutes, and the contrary has been said in several cases; and there is good reason why they should not be considered to be within them; for if they were, it would take away the right of the lord. The object of the statutes was to provide for the occupation of estates *pur autre vie* which upon the death of the owners no person had a present right to occupy, and to apply them for the benefit of the creditors and representatives of the former owners. In *Doe d. Lempriere v. Martin*, 2 Blac. Rep. 1150, Lord C. J. *De Grey* said, that there can be no general occupant of a copyhold, since the freehold is never out of the lord. And the statutes having been passed to obviate the inconvenience of general occupancy shews that they refer to estates *pur autre vie* of a different description from copyholds. Upon the other point the case is equally plain: if the terms of the admission be looked at, it cannot operate as a new grant; because the lessor of the plaintiff claims as administrator, &c. of *Robert Forse* in respect of the former grant to him, in consequence of which the lessor was admitted: but the lord by that did not admit him to any estate which the former grant did not convey.

LE BLANC, J. The statutes only meant to extend to estates where no person would be injured by the appropriation; but if they extended to copyholds, they would operate to the prejudice of the lord, which was not intended. Then the lessor of the plaintiff can have no title but under a subsequent grant of the lord: but the admission of the lessor, claiming in a particular character under the former grant, cannot operate as a substantive grant of a new estate.

Postea to the Defendant.

Wallaston was to have argued for the defendant.

Perks v. Severn.

7 East, 194. Feb. 7, 1806.

An affidavit to hold to bail, only stating that the defendant was "*indebted to the plaintiff in 54l. for goods sold and delivered, (not stating by the plaintiff to the defendant,) and as the acceptor of a bill of exchange,*" is insufficient.

THE defendant was holden to bail upon an affidavit that he was "*indebted to the plaintiff in 54l. for goods sold and delivered, and as the acceptor of a bill of exchange:*" and a rule *nisi* was obtained for discharging the defendant out of custody on filing common bail, upon the insufficiency of the affidavit, in not stating that the goods were sold and delivered *by the plaintiff to the defendant*, and in not stating by whom the bill of exchange was drawn, or in what right the plaintiff sued upon it.

Wigley shewed cause and said, that the defendant could not be *indebted to the plaintiff*, as it was sworn, in *54l. for goods sold and delivered*, unless the goods had been sold and delivered, by the plaintiff to the defendant: and that it was ruled last term in *Bradshaw v. Saddington*, Ante, 94, not to be necessary to state in what character the plaintiff declared on a bill of exchange. There the affidavit was, that the defendant was indebted to the plaintiff in 100l. *upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid.*

Espinasse, in support of the rule, relied principally on the first objection, that the goods were not stated to have been sold and delivered *by the plaintiff*

to the defendant; they might have been furnished upon the credit of a third person. And he referred to *Mackenzie v. Mackenzie*, 1 Term Rep. 717, where Buller, J. mentioned a case of an affidavit "that the defendant was indebted to the plaintiff in 5000*l.* for money had and received, and for which he had not accounted;" which was ruled to be insufficient. There it was not said, "money had and received by the defendant to the use of the plaintiff." And

The Court, on the authority of the last-mentioned case, held the present affidavit to be insufficient,(1) and made the

Rule absolute.

Weld v. Hornby, Clerk.

7 East, 195. Feb. 10, 1806.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred, though in flood times the fish may still overleap it.

The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by Magna Charta, c. 23, and 12 Ed. 4. c. 7, and the right to convert a brushwood into a stone weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: and the action for the injury having been brought within 20 years after the remaining third part was so converted.

THE plaintiff declared, upon his possession of a sole and several fishery, and also of a free fishery, and common of fishery in the several parts of the river Ribble, which lay in the respective manors of Ribchester, Dutton, Aighton Bailey, and Chaignley; and also in that part of the river Hodder which lies in the last-mentioned manor, and which discharges itself into the Ribble; and then alleged, that the defendants wrongfully continued a weir or dam across the river Ribble, lower down the stream than the plaintiff's fisheries, *per quod*, salmon and other fish were prevented from coming to the plaintiff's fisheries, and from spawning there, &c.; and the plaintiff could not enjoy his fisheries *in tam amplo modo*. One of the counts described the obstruction to be by continuing a weir or dam made larger, closer, firmer, and higher than it ought to have been, *per quod*, &c.; and another more generally. Plea not guilty. At the trial before Sutton, B. at Lancaster, it appeared that the plaintiff, who had been in possession of his estate about 29 years, was entitled to a right of fishery in the river Ribble above the defendant's weir, and that before the obstruction complained of he had taken plenty of salmon and other fish within the limits of his fishery, but after the alteration in the defendant's weir there were but few fish to be taken at any time, and sometimes none. That till about 40 years ago, the defendant and the prior owners of Brockhole's mill had always had a brushwood weir across the river Ribble near the mill: and he shewed by old deeds, for two centuries back, that they had a right to have a weir across the river for the use and convenience of their fishery, which right was expressed in those deeds in large and general terms, not limited as to the height, or restricted as to the materials of the weir: but none of the witnesses could remember any other than a brushwood weir prior to the year 1766. At that period the then owner of Brockhole's mill erected a solid stone weir two-thirds across the river in lieu of the former brushwood, leaving the other third composed of the same materials as before; to which it did not appear that any objection was made; and in 1784, the remaining

(1) Vide *Cathrow v. Hagger*, 8 East, 106, and *Taylor v. Forbes*, 11 East, 315, acc.

third of brushwood was removed, and the stone weir carried quite across the river. This weir was a solid piece of masonry, (having three locks in it, as the former wooden weir had for the purpose of catching fish,) about ten feet broad, and nearly level at top, with a straight perpendicular side towards the fall of the river. There was a contrariety of evidence as to the relative height of the new to the old weir, but in the result it did not appear that the present stone weir was either broader or higher than the former brushwood-weir, making reasonable allowance for the sinking of the latter after a time. The present action was brought within three months before the expiration of 20 years from the last alteration. The learned Judge directed the jury to consider, first, whether the alteration of the weir made in 1784 were injurious to the plaintiff's fishery in the stream above: and if it were, then secondly, whether such alteration were made by the defendant in the exercise of his own right, as evidenced by the several deeds, shewing that the defendant and those under whom he claimed had a right to erect and preserve a weir at *Brockholes*; or whether there were any encroachment on the plaintiff's right by the alteration made 40 years ago, when a stone weir was erected two-thirds across the river, which had been acquiesced in without complaint, and by the completion of the weir with stone nearly 20 years before this action brought. And he told the jury, that if there had been an uninterrupted enjoyment of the weir in its present state for 20 years, this action could not be maintained: but that though less than 20 years did not of itself afford a conclusive presumption of right; yet that such a length of possession as had been shewn by the defendant, and of acquiescence on the part of the plaintiff, was certainly evidence of title, and connected with the other circumstances was evidence for them to say whether or not such a possession had a legal commencement, or were an encroachment on the plaintiff's right. The jury on this returned a verdict for the defendant, stating at the same time that they thought the alteration of the weir in 1784 was prejudicial to the plaintiff's fishery, but that the defendant's right was by length of possession and other evidence of title well established.

In *Michaelmas* term last, it was moved to set aside the verdict, as contrary to the evidence of the actual injury sustained by the plaintiff from the alteration of the weir in 1784, and not warranted by any legal inference to be drawn in favour of the defendant's right from the ancient deeds, explained as they were by the description of the weir which had been always in use before 1766, or from the partial encroachment which had been then made, but which still left such a passage for the fish over the remaining brushwood weir as made it not material for the plaintiff to assert his right. A rule *nisi* was accordingly granted.

Topping, *Scarlet*, and *Holroyd* now shewed cause, and argued shortly upon the weight of evidence in favour of the defendant's right to have a weir of stone, if he pleased, from the alteration made in 1766 so long acquiesced in, and followed up by the completion of the work in 1784. And they also adverted to the contrariety of evidence as to the injury to the plaintiff from the latter alteration.

Cockell, Serjt., *Park*, *Wood*, and *Raine* were to have supported the rule.

LORD ELLENBOROUGH, C. J. It is impossible to sustain this verdict. The right set up by the defendant to have a stone weir is plainly founded upon encroachment. The erection of weirs across rivers was reprobated in the earliest periods of our law. They were considered as public nuisances. The words of *Magna Charta*, Ch. 23, are, that "all weirs from henceforth shall be utterly pulled down by *Thames* and *Medway*, and through all England," &c. And this was followed up by subsequent acts, (a) treating them as public nuisances, forbidding the erection of new ones, and the enhancing, strait-

(a) Vide 12 Ed. 4. c. 7.

ening, or enlarging of those which had aforetime existed. I remember that the stells erected in the river *Eden* by the late Lord *Lonsdale* and the corporation of *Carlisle*, whereby all the fish were stopped in their passage up the river, were pronounced in this Court, upon a motion for a new trial, to be illegal and a public nuisance. Now here it appears, that previous to the erection of this complete stone weir there had always been an escape for the fish through and over the old brushwood weir, in which those in the stream above had a right; and it was not competent for the defendant to debar them of it by making an impervious wall of stone through which the fish could not insinuate themselves, as it is well known they will through a brushwood weir, and over which it is in evidence that the fish could not pass, except in extraordinary times of flood. And however 20 years' acquiescence may bind parties whose private rights only are affected; yet the public have an interest in the suppression of public nuisances, though of longer standing. No objection however of this sort can apply to the present case, where the action was commenced within 20 years after the complete extension of the stone weir across the river, by which it is proved that the plaintiff has been injured. Then, however general the words of the ancient deeds may be, they are to be construed, as Lord *Coke* says, by evidence of the manner in which the thing has been always possessed and used.

LAWRENCE, J. The jury themselves have found the fact, that the plaintiff's fishery is injured by the stone weir, and therefore the verdict is against the evidence: and there is no bar to the action from any length of possession in the defendant.

Per Curiam,

Rule absolute.(1)

Stammers v. Dixon.

7 East, 200. Feb. 6, 1806.

One may hold the *prima tonsura* of land as a copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. And ancient admissions of the copyholder and those under whom he claims the land, by the description of "*treas aras prati*," may be construed only to carry the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes, which was in his own wrong.

TRESPASS for breaking and entering the plaintiff's close called *Birds Mead*, in *Langford*, in the county of *Essex*, and removing the earth there, &c. The declaration contained four counts, the two first for trespasses committed on the 16th of *May* 1803, and on divers other days before the exhibiting of the plaintiff's bill, and the two last for trespasses committed on the 31st *December* 1804, and on divers other days, &c. and carrying away a wooden tunnel from the close. Plea 1st, not guilty; 2dly, as to the first and second counts, that the close in which, &c. was called and known as well by the

(1) [In Pennsylvania the owners of land on the banks of the Susquehanna and other principal rivers have not an exclusive right to fish in the river immediately in front of their lands; but the right to fisheries in these rivers is vested in the State and open to all. *Carson v. Blazer*, 2 Binn. 475. *Shunk v. Schuylkill Nav. Co.*, 14 S. & R. 71. See also, *Bennett v. Boggs*, 1 Baldw. 60. In Massachusetts, the common law right of fishing in unnavigable rivers obtains, but is subject to legislative control. This right however does not extend to the entire obstruction of the fish, whereby owners of land above may be prevented from enjoying a similar privilege. *Vinton v. Welsh*, 9 Pick. 87. *Commonwealth v. Chapin*, 5 do. 199. *Waters v. Lilly*, 4 do. 145. See also, *Hooker v. Cummings*, 20 Johns. 90. *Canal Commissioners v. The People*, 5 Wend. 423. *People v. Seymour*, 6 Cow. 579. An important decision by the Supreme Court of Pennsylvania upon the right of the Legislature over navigable streams declared by law to be highways, will be found in the late case of *The Monongahela Nav. Co. v. Coons*, 6 W. & S. 101.—W.]

name of *Monks Hope* as of *Birds Mead*, and was a copyhold tenement of the manor of *Hatfield Peverell* in *Essex*: and that before the trespasses complained of, viz. on the 28th of *September* 1782, the lord granted the said copyhold to one *S. Sandford*, *habendum* to him, his heirs and assigns, at the will of the lord according to the custom of the said manor, by virtue whereof *S. S.* entered and was seised in fee, according to the custom of the manor; and then the defendant, as his servant, and by his command, justified the breaking and entering, &c. And as to the trespasses in the third and last counts, the defendant justified in like manner under *S. S.* as a customary tenant of the said manor under a grant from the lord of a customary tenement on the 12th of *April* 1804, to *S. S.*, his heirs, &c. The replication joined issue on the plea of not guilty, and denied that the close in which, &c. was a copyhold tenement, as alleged in the second plea, or a customary tenement, as alleged in the third plea, of the manor of *Hatfield Peverell*; on which issues were also joined.

The action was brought at the last assizes for *Essex* before *Heath*, J. in order to try the plaintiff's right to the soil of the close in question; the plaintiff claiming it as his freehold, the defendant insisting that it was his copyhold or customary estate holden of the manor of *Hatfield Peverell*. It appeared that the close was known as well by the name of *Birds Mead* as of *Monks Hope*; that it was low meadow land, consisting of three acres, bounded on one side by the river *Blackwater*, on another side by a small ditch or grip, beyond which was a piece of land, half an acre, in the occupation of the plaintiff, rented by him of a Mr. *Westcomb*, and called *Westcomb's Half-acre*. The plaintiff had scoured the river, and laid part of its mud on the banks for the purpose of raising them; the throwing back of which into the river by the defendant was one of the trespasses complained of. And the defendant had also removed from the grip or ditch an old trunk which had a valve that prevented the river from flowing into the close in times of flood, and at other times carried off the water from the close, which was the other act of trespass complained of. It appeared in evidence, that the plaintiff and all former occupiers of the close under Mr. *Westcomb*, and those whose estates he has, for more than 60 years past had exercised divers acts of ownership upon the said three acres after the fore-crop had been taken by the defendant and those under whom he claims. Mr. *Westcomb's* tenants had always turned their cattle on the three acres, and had the exclusive feeding of them from *Old Lammas* till *Old May-day*. They had cut the bushes for repairing the fences of the close; and at subsequent periods erected and maintained at their expence posts and rails on part of the premises; they had put down the wooden tunnel in the ditch; and had from time to time lopped two ashes and a willow growing on the premises; and frequently scoured the ditch or grip before-mentioned. One of the tenants about 13 years ago had scoured the river, and laid the mud on the banks; and another former tenant or owner of *Westcomb's* estate had cut the bushes on the three acres and carried them to repair the fences of the adjacent field in his occupation. On the other hand, the defendant (who had purchased from *S. Sandford* on the 12th of *April* 1804) proved that *S. Sandford*, and all those whose estate he had, had always taken the fore-crop of grass and pasturage from *Old May* to *Old Lammas* day. That the *Sandfords*, (who lived four miles off, and had no other lands nearer,) had scoured the ditch or grip twice. That they had paid all the parish rates, the landtax, and the composition for the highways, in respect of the three acres. And he also produced the court rolls of the manor of *Hatfield Peverell*, which are extant only from the reign of Queen *Mary*, in which appeared an entry of a surrender in the 18th of *Eliz.* by *John Bird* and *Margery* his wife of a copyhold tenement, by the description of "*Tres acras prati, vocati Monk's Hope, jacentes in Langford*," to the use of the surrenderors and the survivor for life, remainder to the heirs of the

wife; with an admission according to the surrender: and there were seven other similar Latin entries of admissions, surrenders, descents, and devises, (including a recovery); and also regular entries in English from the year 1747, when a *Sandford* was first admitted, down to the 12th of April 1804, when *S. Sandford*, who was before admitted in fee, surrendered to the defendant; in all which English entries the premises are described as "*three acres of meadow lying in Langford, called Monk's Hope.*" The learned judge being desirous of referring the question of law to this Court, and for that purpose of settling the facts as to those acts of ownership which had been exercised by the plaintiff and defendant respectively, left it to the jury to say in whose favour the weight of evidence preponderated, exclusive of the entries of admissions in the court rolls, the construction and effect of which he was desirous to reserve for the consideration of this Court: and under that advice the jury first found that the weight of evidence in respect of those acts of ownership was in favour of the plaintiff. Whereupon the learned Judge directed them to find a general verdict for the plaintiff; he being of opinion that though the terms of the surrenders and admissions were sufficiently comprehensive to pass the soil and freehold; yet that, as in ancient grants, the legal import might be restrained by long concomitant usage, which might be taken as evidence of the original intent of the parties in making the grant; so here by received usage the grant might be restrained to and only pass the *fore-crop*, which would not carry the *soil*: but he permitted the defendant's counsel to move to set aside the verdict for the plaintiff, and enter a verdict for the defendant, if this court should be of opinion with the latter upon the construction and effect of the written evidence. And a rule *nisi* having been obtained in last *Michaelmas* term,

Shepherd and *Bailey*, Serjts. now shewed cause. The defendant does not confine his claim to the *fore-crop*; but the principal issue is, Whether the *locus in quo* be *copyhold* of the manor of *Hatfield Peverell*, that is, Whether the *whole* interest in the land, including the *soil*, and not merely the *prima tonsura*, be the *copyhold* of the defendant; for if the *soil* be the *freehold* of the plaintiff the verdict has been rightly found, though the *prima tonsura* be the *copyhold* of the defendant. No doubt, as Lord *Coke*(a) shews, there may be a *copyhold* interest in part, and a *freehold* interest in other part of the same land. And though the fact of having always taken the *fore-crop* may be evidence of a right to the *soil*, it is only *evidence*: and that conclusion may be rebutted by other evidence of acts of ownership done by another. Suppose all the interest in the land had been *freehold*, and one had always taken the *fore-crop*; and another the *after-crop*, the *freehold* of the *soil* might be in either, and in which of them it was must be decided by shewing which of them had exercised every other act of ownership, such as cutting trees and fences, putting up and repairing fences, scouring ditches and applying the *soil*, keeping drains, &c., all which have been done by plaintiff in this case, who has always enjoyed the land for the rest of the year after the *fore-crop* was taken. Then whether the right claimed by the defendant arise to him as a *freeholder*, or as a *copyholder*, the evidence must be the same against one claiming an adverse right. And though old title deeds be evidence, yet they are entitled to little or no weight, unless accompanied with the possession. And though the terms of the *copyhold-grant* to the defendant be sufficient as between him and the lord to pass the *soil*, yet they cannot conclude the plaintiff who is a stranger to both, and who has had so long a possession against both. It might have been different if both parties had claimed by copy under the lord, and the plaintiff's copy had been less extensive and general than the defendant's; for then perhaps the acts of the same lord might have been strong evidence as between his tenants. But here the question is in effect between the lord

(a) Vide Co. Cop. s. 42. *Hoe v. Taylor*, 4 Rep. 31, and Co. Lit. 58, b.

of the manor claiming the freehold of the soil in question against the plaintiff, who claims it as his freehold. Then it is not enough for the lord to shew that he has demised the land by copy for a long period of time, unless he also shews that his tenant has had possession under it. And it is competent to the plaintiff to shew that during all that time he has exercised every act of ownership upon the estate except taking the fore-crop. Such adverse possession therefore is sufficient to explain and controul the terms of the lord's grant, and to shew that it only passed the fore-crop, which alone has ever been enjoyed under it. It is however immaterial in this case, whether the soil ever were part of the manor of *Hatfield Peverell*; for consistently with the evidence in the cause it might have been parcel of the demesnes of the manor, and the lord may have granted the fore-crop by copy to those from whom the defendant claims, which would give the tenant a right to maintain trespass against those who trespassed upon his fore-crop; and the lord might have granted the fee, excepting the fore-crop, to those from whom the plaintiff claims. The jury then have found the facts according to the evidence, and upon those facts the conclusion of the learned judge at the trial was warranted by law.

Garrow and *Marryat* in support of the rule. Admitting that the right to the fore-crop is not conclusive of the right to the soil, yet *prima facie* the enjoyment of the fore-crop imports the possession of the freehold; and such is the presumption of law in the absence of other more certain evidence of the original grant, according to the opinion in *Ward v. Petifer*, Cro. Car. 362. [*Lawrence, J.* observed, that Lord *Kenyon*, in a case of *Newstead v. Keys*, E. 34 Geo. 3, had said, that the opinion there delivered was not quite accurate; for that all which was there determined was, that *prima tonsura* was evidence only of the right to the soil. To which *Marryat* answered, that he was counsel in that case, and that the verdict was in favour of the party who had enjoyed the *prima tonsura*.] And in a case where the claims of both parties must originate from grant every presumption is to be made in favour of him who shews a grant comprehending the soil in the terms of it, and against the party who does not produce any title deeds, which he may purposely withhold because they may only convey the after-crop. Neither were the other acts of ownership (exclusive of taking the fore-crop by the defendant) all in favour of the plaintiff; for the defendant had scoured the ditch twice. And as to the setting up and repair of the fences, to which purpose also the cuttings of the trees and bushes were applied, it is rather a burthen than a benefit, and was much overbalanced by the payment of all the rates and taxes for the whole land by the defendant. At any rate, however, the effect of the entries in the court rolls ought not to have been withdrawn from the consideration of the jury: for at least, they were important to shew in what right the defendant claimed to take the fore-crop, and those entries went to shew that he claimed in right of the ownership of the soil.

Lord ELLENBOROUGH, C. J. Upon the first discussion of this question, though I thought the verdict was right, yet I doubted how far the learned judge's direction could be sustained; but I am now satisfied that they were both right. This is an action for certain trespasses alleged to have been committed in the plaintiff's close called *Birdsmead*, which close, known otherwise by the name of *Monk's Hope*, the defendant by his plea alleges to be copyhold holden under the manor of *Hatfield Peverell*, and justifies the trespasses in that close under a grant from the lord, and by the command of the copyholder. Now the word *close* imports in the abstract the interest in the soil; and if the defendant only make out that he has a partial interest in the land, such as the right *primæ tonsuræ*, the issue must be found against him. And the evidence shews that from all time the defendant's benefit has been confined to the taking the fore-crop, and that every other benefit of the land has been enjoyed by those from whom the plaintiff claims. We must then construe the rights of

the parties, however derived from ancient grants, consistently with the possession: and there will then exist a copyhold interest in the *prima tonsura* for the defendant, and every other freehold interest in the land for the plaintiff. But this, it is said, is inconsistent with the entries on the court rolls, which grant an interest in the soil to the tenant, and were evidence for the jury to shew in what right the defendant claimed and took the fore-crop. The admissions are to "*tres acras prati*:" but can it be said that the word *prati* is not open to receive any construction which will carry a less interest than the whole right to the soil. The Judge thought, that if the usage in fact were that the defendant and those under whom he claimed had never enjoyed any other benefit of the land than the fore-crop, and that those under whom the plaintiff claimed had enjoyed every other benefit of it, that word might receive a construction conformable to the actual enjoyment: and I think he was right in that opinion. And then he properly put the question to the jury to say how the fact of the enjoyment was: and when they found that the possession of every thing but the *prima tonsura* had been with the plaintiff; he gave it as his opinion that the word *prati* would admit of such a construction as to pass only the fore-crop to the defendant; and that therefore notwithstanding those admissions, the jury might find for the plaintiff; reserving for the judgment of this court the simple question of law upon the legality of such construction. With that direction, so understood, I do not find fault, thinking it substantially right.

LAWRENCE, J. I am of the same opinion. The learned Judge told the jury, that they need not consider the effect of the admissions, because the construction of them was with him. He could not have meant to say, that the admissions were not to be considered at all: but he desired them first to consider the weight of the evidence of acts of ownership: and when they had found that in favour of the plaintiff, he considered that the word *prati* with reference to the usage might be confined to the *prima tonsura* of the land. That in substance was the direction on which the verdict was founded. And on the merits I see no ground for setting it aside. The taking of the fore-crop is only evidence of the right to the soil, and all the rest of the evidence was with the plaintiff. And at all events nothing can be inferred from the charge upon the defendant for all the taxes of the land; which was certainly wrong, as they ought to have been apportioned according to the value of the enjoyment by the respective parties.

LE BLANC, J. The only question is, whether we should send this case to a new trial in order to have in substance the same direction given to another jury. For on the next trial, the Judge would tell the jury, that as the admissions might either be construed to pass the whole soil, or only the first-crop, they ought to take into their consideration the weight of evidence of all other acts of ownership and enjoyment by the plaintiff and those under whom he claimed, as shewing his right to every other interest in the land except the first-crop; and that the terms of the admissions were not incompatible with such a right in the plaintiff. In that view of the case, the same thing has in effect been done. There were certain written entries given in evidence on the part of the defendant, upon the construction of which the jury were properly to take the advice of the Judge: and the Judge told them, that according as they found the weight of the evidence of acts of ownership with the defendant or the plaintiff, he was of opinion that those admissions would carry the whole soil, or only the first-crop to the defendant. There was nothing therefore withdrawn from the consideration of the jury, which they ought properly to have considered apart from the advice of the Judge.

Rule discharged.

Swan and Others v. Steele, Clerk, and Wood.

7 East, 210. Feb. 7, 1806.

A., *B.*, and *C.* traded under the firm of *A.* and *B.* in the cotton business, *C.* not being known to the world as a partner; and *A.* and *B.* traded as partners alone under the same firm in the business of grocers; in which latter business they became indebted to *D.*, and gave him their acceptance, which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of *A.* and *B.* a bill of exchange to *D.*, which they had received in the cotton business; in which *C.* was interested; but such indorsement was unknown to *C.*, of whom *D.* the indorsee had no knowledge at the time: held that such indorsement in the firm common to both partnerships of a bill received by *A.* and *B.* in the cotton business bound *C.* their secret partner in that business, and that consequently *C.* was liable to be sued by *D.* on such indorsement, the latter not knowing of the misapplication of the partnership fund at the time.

IN *assumpsit*, the plaintiffs declared, first on a bill of exchange, dated 26th of August 1803, drawn by *D. Maitland* on *Campbell* and Co. for 342*l.*, payable to the order of the defendants and one *Geo. Payne*, deceased, three months after date, and indorsed by the defendants and *Payne*, under the firm of *Wood* and *Payne*, to the plaintiffs; and which bill *Campbell* and Co. had accepted. The plaintiffs also declared for goods sold and delivered, and on the common money counts. The defendant *Steele* pleaded *non assumpsit*, and the defendant *Wood* suffered judgment by default. And at the sittings after last Trinity term at *Guildhall*, the jury found a verdict for the plaintiffs for 368*l.* 5*s.* 4*d.*, subject to the opinion of the Court on the following case.

Wood and *Payne* mentioned in the pleadings were wholesale grocers in *Liverpool*, trading under the firm of *Wood* and *Payne* from Jan. 1802 until Jan. 1804; with whom the defendant *Steele* became a partner in May 1802, and so continued till January 1804, in the business of buying and selling cotton; which business was also carried on under the same firm of *Wood* and *Payne* and at their counting-house: but *Steele* was never interested in the grocery business. *Steele* took no active part in the cotton concern; nor was it known to the world or to the plaintiffs that he was a partner. The plaintiffs sold to *Wood* and *Payne* as grocers, a quantity of sugar, for which they gave their acceptance in the firm of *Wood* and *Payne* at four months, due the 11th of October 1803; and not being able to provide for it when due, *Wood* and *Payne*, on the 8th of October 1803, delivered to the plaintiffs the bill mentioned in the declaration due the 29th of November, with others, to provide for that acceptance; and the said bill was indorsed by either *Wood* or *Payne*, in the firm of *Wood* and *Payne*, without the actual knowledge of *Steele*, as all other bills in the cotton concern were. The said bill had been paid to *Wood* and *Payne* as cotton dealers by the drawer thereof for cotton sold to him, in which *Steele* was as aforesaid interested; and the name "*D. Maitland*" thereto subscribed as the drawer, was the hand-writing of *D. Maitland* of *Wigan*, to whom the cotton was sold. The said bill has been dishonoured, of which *Wood* and *Payne* had due notice. *Wood* and *Payne* became bankrupts on the 16th of January 1804, and the effects of the said cotton concern are insufficient to discharge its debts; and *Steele*, when he has discharged those debts, will be a creditor of the concern. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, then the verdict was to stand; otherwise, a verdict was to be entered for the defendant *Steele*.

Wood for the plaintiffs. *Wood* and *Payne*, being partners with *Steele*, had authority to dispose of the partnership effects for such purposes as they thought proper. One partner may negotiate or indorse bills without the other; so he may sell the partnership effects, or release partnership debts. And he is only liable to his partners for misapplication of the funds; but it is a good disposi-

tion as to third persons, unless they collude with one to defraud another partner: and no fraud is imputed here. The Court then desired to hear the other side.

Littledale, contra, said, that the bill in question was not taken originally as payment for the goods in the usual course of trade, but was afterwards received by the plaintiffs as collateral security for the payment of *Wood* and *Payne's* own acceptance. It was therefore given by the two partners as a *pledge*, and not as payment; and one partner has no authority to *pledge* the goods or securities of another. The only difference between this case and that of *Sheriff v. Wilkes*, 1 East's Rep. 48, is, that there the creditor, when he accepted the security from one of the partners for his particular debt, knew that it was part of the partnership funds. [Lord *Ellenborough*. That makes all the difference.] But whether the creditor acquire that knowledge before or after the acceptance of the bill cannot make any difference in this case, where he seeks to bind the defendant *Steele* by an implication of law in consequence of the fraudulent act of his partners; not having looked to his security at the time. For no contract can arise by operation of law out of a fraud against an innocent person, because of the ignorance of one of the parties to the contract at the time of the interest of such innocent person. If the plaintiff's knowledge of *Steele's* interest in the bill at the time of its indorsement to him would have avoided the indorsement as fraudulent, it is incongruous to say that his coming to the same knowledge subsequently shall give him a new security which he did not before contemplate. [*Le Blanc*, J. Suppose the bill had been made payable to *Wood*, *Payne*, and *Steele* by name, and *Wood* had indorsed it in the partnership firm, without the knowledge of *Steele*, would not that have bound them all, unless the creditor had known that this was done without the knowledge or consent, and in fraud of *Steele*?] If the creditor received it in payment for the individual debt only of the one partner, he ought perhaps to apply to the other to know if the indorsement were made with his consent, without which he must necessarily know that it was a fraud upon such other partner.

LORD ELLENBOROUGH, C. J. It would be strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners to apply to each of the other partners to know whether he assented to such indorsement; or otherwise that it should be void. There is no doubt that in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners. There may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name or firm of the partnership. The case is too clear for argument, and I should not have permitted the point to be reserved if I had not understood at the trial that there were some other facts in the case which might raise a doubt. The distinction is well settled, that if a creditor of one of the partners collude with him to take payment or security for his individual debt out of the partnership funds, knowing at the time that it is without the consent of the other partner, it is fraudulent and void; but if it be taken *bona fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner in giving such security can disaffirm the act. Now here the three persons were trading under the firm of *Wood* and *Payne*, and in the course of their dealings as partners received the bill in question; and it was competent to either of them by his indorsement in the name of the firm to pass their interest in the bill: and the plaintiffs, ignorant of any fraud at the time, take it by such indorsement from one of the partners. Then if the interest of the plaintiffs in the bill were once well vested, no subsequent knowledge that such indorsement was made without the consent of one of the partners will divest it. And it would be highly inconvenient that it should; because if the plaintiffs had been apprised at the time that the partner who

indorsed the bill had no authority to do so, they might have obtained some other security for their demand.(1)

The other judges all concurred.

Postea to the Plaintiffs.

The King v. Watson.

7 East, 214. Feb. 8, 1806.

Whether or not a parish can have the benefit of the stat. 43 Eliz. c. 2, by maintaining its poor with not more than four overseers, is a fact which the Sessions ought to find, and should not leave to be presumed by the court from other conflicting evidence stated in a case reserved; such as, that the parish had the benefit of the statute down to 1739, and from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but that the population was decreased.

THIS came on upon a rule to shew cause why an order of Sessions, disallowing the appeal of the defendant against a rate for the relief of the poor of the township of *Bedlington*, in the parish of *Bedlington*, in the county of *Durham*, should not be quashed for the insufficiency of it. The appellant, who was an occupier of lands in the said township, appealed to the Sessions against the rate, on the ground that the township of *Bedlington* was not in point of law entitled to maintain its own poor by a separate rate made upon it, apart from the rest of the parish of *Bedlington*; but that the township of *Bedlington*, together with the townships of *Netherton*, *Choppington*, *East Sleekburn*, *West Sleekburn*, and *Camboise*, (all of which townships are situate within, and together constitute, the parish of *Bedlington*.) ought to maintain their poor conjointly by one general rate for the whole parish. But the sessions disallowed the appeal, subject to the opinion of this court on the following case.

Previously, and up to the year 1739, the six several townships in the parish of *Bedlington* were united, and the poor of the parish were maintained by one joint and general rate, made by the four churchwardens and two overseers appointed for the whole parish, upon the occupiers of rateable property within the same. From 1739 to 1753 it does not appear by what rate the poor of the parish were maintained, or how the overseers of the poor were appointed during that period: but since 1753 to the present time, the parish has been divided into six townships, and the poor of each township have been maintained by a separate rate made upon each respective township, and separate overseers of the poor have been appointed for each township. The parish of *Bedlington* has rather decreased in population; but the decrease has been principally in the township of *Bedlington*. Two orders for the removal of paupers have been made, one from the township of *Bedlington* to the township of *Netherton*, dated the 17th of July, 1798, and the other from the township of *Netherton* to the township of *Bedlington*, dated 13th of November 1798; which orders of removal were acquiesced in. The rental of the rateable property in the township of *Bedlington* appears by the present rate to be 3905l.

(1) Vide *Ridley & al. v. Taylor*, 13 East, 175, where the principle of this decision was recognized; but the Court held that the circumstances of the transaction in that case did not furnish any presumption of fraud on the part of the creditor, or knowledge of the separate debtor's want of authority to use the name of the firm. The order in which the *onus probandi* falls upon the parties respectively is this. The partnership being established, the partner claiming not to be liable for an act done in the name of the firm, must shew that it was done by the other partner on his separate account and without authority. This fact being established, the creditor must shew that he had no knowledge of the want of authority. *Ex parte Bonbonus*, 8 Ves. jun. 540; *Livingston v. Roosevelt*, 4 Johns. 251; *Dubois v. Roosevelt*, 4 Johns. 262, n.; *Livingston v. Hastic & Patrick*, 2 Caines, 246; *Lansing v. Gaine & Ten Eyck*, 2 Johns. 300.

2s. The parish of *Bedlington* is five miles in length and three miles in breadth. Constables have been appointed in each of the six townships.

When this case was called on, *Const* and *Littledale* appeared as counsel in support of the order of Sessions, and *Topping*, *Wood*, and *Hullock* contra. And Lord *Ellenborough* having asked why the Sessions did not find the fact, whether or not the parish of *Bedlington* could have the benefit of the stat. 43 Eliz. c. 2, which he said was a fact for them to decide, and not to be left to the Court to presume from other evidence; (a) *Const* referred to *Pear* v. *Westgarth*, 3 Burr. 1610; *Rez* v. *Sir W. Horton*, 1 Term Rep. 374; *Rez* v. *Leigh*, 3 Term Rep. 746, and that class of cases, where the Court had decided the same sort of question upon general evidence of the circumstances and usages of the parish, shewing that it could not have the benefit of the statute, without a precise finding of the fact: and he said, that by dismissing the appeal in this case, the Sessions have in effect drawn the conclusion that this parish cannot have the benefit of the statute of Elizabeth.

Lord ELLENBOROUGH, C. J. If I were to draw any conclusion from the facts here stated, it would rather be the contrary conclusion: for down to the year 1739 it is certain that the parish had the benefit of the stat. 43 Eliz., and it does not appear but that they had the same down to 1753; and since that time it appears that the population of the parish has decreased: from all which I should be led to conclude that they might the more easily have the benefit of the statute. I know that different opinions have at different times prevailed as to the better policy of providing for the poor in larger or in smaller districts; but I had rather guide myself by the words of the act of parliament, and by the fact, than by any fluctuating policy which sometimes leans one way and sometimes another. Whether a parish can or cannot have the benefit of the statute, is a fact, which the Sessions ought to find upon all the circumstances laid before them, and not leave us to presume it how we may. Then have the Sessions here found the fact: or have they stated those facts from whence we must necessarily see that the parish cannot have the benefit of the statute. They have not done either. The case must go back to them to find the fact. The enacting words of the statute 13 & 14 Car. 2. c. 12. s. 21, though general, must be taken to refer to parishes so circumstanced.

LAWRENCE, J. observed, that in *Rez* v. *Leigh*, 3 Term Rep. 746, it did not appear but that even prior to the time there mentioned the poor of the parish had been provided for under the stat. 13 & 14 Car. 2. (c. 12. s. 21.); from whence it might be inferred, that the parish never had had the benefit of the statute of Elizabeth: whereas here it was found, that prior to the year 1739 they always had the benefit of it.

Per Curiam,

Let the case go back to the Sessions to be re-stated.

The King v. Dobson and Another.

7 East, 218. Feb. 8, 1806.

One who was appointed collector of certain duties by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, can not be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties: though the money were fraudulently collected and misapplied by him; because he was *in fact* appointed collector, and in that character received the money. And *quære* whether the statute 43 Geo. 3. c. 99. s. 19, having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the acts.

(a) Vide *Rez* v. *Newell*, 4 Term Rep. 266, and *Lans* v. *Cobham*, ante, 1.

AN information for a misdemeanor at common law, filed by the Attorney-General against the defendants, for a fraud committed by them in the collection of the assessments under the Property-tax act 43 G. 3. c. 122, stated in the first count, that the defendants before and *at the time of committing the offences* hereinafter first and secondly mentioned *were collectors of certain duties* payable to the King under the stat. 43 G. 3, &c. That *being such collectors*, the defendants, not regarding their duty *as such collectors*, but unlawfully intending to cheat and defraud one *A. P.* with force and arms, on, &c. at, &c. did, *by colour and pretence of their said office*, unlawfully and fraudulently, &c. demand and exact from the said *A. P.* 5*l.* 5*s.* as and for duties payable by him to the defendants *as such collectors*, &c. whereas the said sum so demanded and exacted was not, nor was any money then and there payable by *A. B.* as and for duties to the defendants *as such collectors*, &c.; and that the defendants afterwards converted the said 5*l.* 5*s.* to their own use; in contempt, &c. The 2d count was the same, except that it did not charge the defendants with converting the money to their own use. The 3d count charged, that the defendants intending to cheat and defraud *A. P.*, with force and arms, on, &c. at, &c. did *by colour and pretence of the said defendants being collectors of certain duties* payable to the King by virtue of the said act, unlawfully and fraudulently, &c. demand and exact of and from *A. P.* 5*l.* 5*s.* as and for duties payable by him to the defendants for the King's use, by virtue of the said act, &c.: and did then and there, in pursuance of such demand and exaction, unlawfully, and fraudulently, &c. receive from *A. P.* 5*l.* 5*s.*: whereas the said sum was not, nor was any sum then and there payable by *A. P.* as and for duties to the defendants for the King's use under the said act, &c.: and that the defendants afterwards converted the said sum to their own use, in contempt, &c. The 4th count was the same, only not charging that the defendants converted the 5*l.* 5*s.* to their own use. A fifth count charged, that the defendants as common cheats, for the sake of unlawful gain and lucre to themselves, pretending that 5*l.* 5*s.* was due for certain duties from *A. P.* as the occupier of certain lands, &c. required him to pay the same to the defendants *as collectors*, &c. which *A. P.* did accordingly pay: whereas the said lands, &c. were not charged to the said duties, and the said sum was not due from *A. P.*; and that the defendants afterwards converted the said sum to their own use. And a 6th count corresponded to the last, only omitting the charge of converting the money to their own use.

At the trial before *Chambre, J.* at *York*, it appeared that the defendants had been in fact appointed collectors of the duties under the Property-tax act 43 G. 3. c. 122, for the township of *Pickering* in the *North-Riding*, for the year 1803, ending 5th of *April* 1804. And they did in fact make their collection in the district from the persons assessed, and also collected 5*l.* 5*s.* from *A. P.* mentioned in the information, whose name was not in the commissioners' assessment, and which sum was not accounted for. It was however objected at the trial, that as the defendants were not proved to have been regularly appointed collectors by warrant under the hands and seals of the commissioners, as required by the stat. 43 Geo. 3. c. 99. s. 12, by reference from the re-enacting clause (s. 2.) of the Property-tax act 43 Geo. 3. c. 122, they could not be convicted upon those counts charging them with the commission of the offence *as collectors*; they were accordingly convicted on the 3d and 4th counts, which only charged that they did the act *by colour and pretence of their being collectors*, and were acquitted upon all the other counts. And on a former day

Heywood, Serjt. obtained a rule *nisi* for a new trial, upon the ground that the defendants having been in fact appointed collectors of the duties, and having committed the offence imputed to them in that character, could not be convicted of a misdemeanor at common law, the charge being of an offence within the stat. 43 Geo. 3. c. 99. s. 51, in "having received the duties of a person not charged therewith;" and the 19th section of the same act having

provided, "that no commissioner, assessor, or collector who shall be employed in the execution of any such act or acts herein mentioned, or of this act, shall be liable for or by reason of such execution to any *penalty* or *penalties* other than such as by this act, or the said act or acts, are or may be inflicted." And sect. 51, enacts, "that no collector of any of the duties therein mentioned shall collect the same by any rate or book other than such as shall be signed and allowed by such commissioners, &c. And that in case any such collector shall collect the same by any other rate or book, or shall receive such duties from any person not charged therewith, or shall collect from any person more money than is actually charged in such rate or book, after the same has been signed and allowed, &c.; every such collector shall for every such offence forfeit 100*l*."

The Solicitor General, (with whom were *Cockell*, Serjt. *Park*, and *Wood*), contended, 1st, That the word "*penalties*" in the statute meant only "*pecuniary penalties*," and could not be meant to exempt an offender against the statute from being punished by indictment or information at common law: for otherwise this absurd consequence would ensue, that though a collector had cheated the public or the crown of 1000*l*. or more, he could only be liable to a penalty of 100*l*. given by the 51st section. There is certainly some obscurity in the wording of the statute: but the difficulty might be obviated by the Attorney general remitting any penalty which might be inflicted upon an indictment or information beyond the amount limited by the statute, if more were imposed; or if the penalty had been before recovered in any other proceeding. In 2 Hawk. ch. 25. s. 4, it is said that "Where a statute makes a new offence, which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment or action of debt, or information, &c. without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment; because the mentioning the other methods of proceeding only seems impliedly to exclude that of indictment. Yet it hath been adjudged, that if such a statute give a recovery by action of debt, bill, plaint, or information, or otherwise, it authorizes a proceeding by way of Indictment. Also where a statute adds a further penalty to an offence prohibited by the common law, there can be no doubt that the offender may still be indicted, if the prosecutor think fit, at the common law." Now the offence of which the defendant stands convicted was an offence at common law, and the statute only superadds a penalty in the particular instance. [*Le Blanc*, J. observed, that the difficulty here arose from the negative words of the 19th section. And by Lord *Ellenborough*, C. J. the word *penalty*, (a) in its large and legal sense, includes every species of punishment, corporal as well as pecuniary. And therefore if a statute repeals all *penalties* generally in respect of any offence, it will repeal corporal as well as pecuniary punishment. Though the meaning of the word may be narrowed by the context.] Here the other provisions of the act, and the obvious meaning of the legislature, shew that the word *penalties* was meant to be confined to *pecuniary penalties*. But, 2dly, The defendants were not proved to be legally appointed *collectors*; and upon objection taken at the trial they have been acquitted upon those counts charging the offence to have been committed by them in that character; and they now stand convicted only of the offence of receiving the money *under colour and pretence of being collectors*: the objection therefore upon the statute does not arise; for it is no offence within it unless committed by persons duly appointed collectors. [*Lord Ellenborough*, C. J. If they acted as collectors, it would be sufficient to charge them criminally with a breach of duty in that character. But here they stand acquitted in their character as collectors.]

Heywood, Serjt. and *Holroyd*, after some few observations, principally upon

(a) *Heywood*, Serjt. afterwards referred to *Johnson's Dict. Blac. Com. and Cro. Jac.* 414, 415, in corroboration of the extensive signification of this word.

the manner in which the case had been left to the jury, which they said did not warrant the distinction which had been since adopted in entering up the verdict, were stopped by the Court.

LORD ELLENBOROUGH, C. J. The question is reduced to this, Whether the evidence supports the finding of the jury upon counts charging the defendants with having unlawfully and fraudulently received the duty from the person named by colour and pretence of their being collectors of certain duties? Now, by colour and pretence must be understood what the parties knew at the time of the receipt to be colour and pretence; but that does not apply to the situation of the defendants who were in fact appointed by the constituted authorities, though in an informal manner, to act as collectors in the receipt of the duties. They were therefore entitled to the benefit and protection which the act meant to extend to persons acting in that character. The commissioners thought they were proper officers, and the defendants thought themselves such. The imputation therefore of colour and pretence, conveyed by the third and fourth counts, does not apply to them, and therefore the conviction on those counts cannot be sustained.

Grose and Lawrence, Justices, declared themselves of the same opinion.

LE BLANC, J. I consider the 19th section as holding out a protection to all officers employed in the execution of the acts, amongst others to collectors; and therefore if the commissioners have omitted any formality in the defendant *Dobson's* appointment, whom they have in fact appointed a collector, that will not authorize them to take advantage of the defect, and prosecute him as if he were no collector, but had merely acted by colour and pretence of being such, when all parties considered him, as he considered himself, at the time to be duly invested with that character.

Rule absolute for a new trial.

Rushforth and Others, Assignees of *Rushforth v. Hadfield and Others.*

7 East, 224. Feb. 8, 1806.

Where no lien exists at common law it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealings. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage price of the particular goods, there ought to be very strong evidence of a general usage for such a lien to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract: and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendants and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, though not opposed by other evidence, the Court refused to grant a new trial.

THIS was an action of trover to recover the value of a quantity of cloth which the bankrupts had sent by the defendants as common carriers, who claimed a lien upon it for their general balance due to them as such carriers for other goods before carried by them for the bankrupts. The plaintiffs had tendered the carriage price of the particular goods in dispute, and the sole question was, Whether the defendants, as common carriers, had a lien for their general balance. On the first trial a verdict was found for the defendants, which this court thought was not sustained by the evidence, and therefore they granted a new trial. (a) The cause was again tried at the last assizes

(a) *Rushforth and another, Assignees, &c. v. Hadfield*, 6 East, 519.

at *York*, before *Chambre, J.*, when the defendants' book-keepers in *London*, at *Stamford*, and at *Huddersfield*, swore to their practice to retain goods for their general balance, and particularized one instance in *December 1799*, where an action was brought, which being referred, was decided on another point: a second in *May 1800*, where there was no bankruptcy: a third in *May 1803*, where the bankrupt's assignee demanded the goods, but afterwards paid the balance: a fourth and a fifth in the same year, when the individuals paid the balance, but no bankruptcy intervened: and a sixth instance of the like sort as the last in *1804*. In addition to these, *Welch*, a carrier from *Manchester* and *Leeds*, deposed to an instance of retention of goods for the general balance three years back, where a bankruptcy intervened, and the assignees disputed the payment at first, but afterwards paid the balance: and to two other instances of goods sent to *Glasgow*; one where the carriage of the particular goods was *3*l.** and the general balance *20*l.**: another where the carriage was a few shillings, and the general balance *8*l.**; in both instances bankruptcies intervened, and the assignees paid the general balance. *Hanley*, a *Northallerton* carrier, spoke to two instances of retainer of goods 12 and 13 years ago till the individuals paid the general balance; but neither were bankrupts. The book-keeper of *Pickford*, a carrier from *London* to *Liverpool*, particularized an instance of retaining for the general balance in *1792*, where the vendee became bankrupt; but there the vendor stopped *in transitu*, and he paid the general balance at the end of two months: a second similar instance in the same year: a third instance in *1795*, where the senders became bankrupts, and their general balance was paid by the vendees: a fourth in *1795*, where the goods of an individual, not bankrupt, were detained several years; but no account how the matter was finally settled: and two other like instances in *1794* and *1795*. And *Clark*, a *Leicester* carrier, also mentioned two instances, one in *1775*, the other afterwards, of retaining the goods of solvent individuals till they paid their general balance. All these carriers, who had followed their occupation from 20 to 30 years and upwards, deposed generally to their custom of retaining goods for their general balance in other instances as well as in those particularized. It was left to the jury to decide whether the usage were so general as to warrant them in presuming that the bankrupts knew it, and understood that they were contracting with the defendants in conformity to it; in which case they were to find for the defendants: otherwise they were told that the general rule of law would entitle the plaintiffs to a verdict. On this direction the jury found for the plaintiffs; which was moved to be set aside in last *Michaelmas* term, as a verdict against all the evidence.

Cockell, Serjt. now shewed cause against the rule. This was a question for the jury, which, having been properly submitted to them, their verdict must decide. In the absence of all evidence of any particular dealing between these parties, they must be taken to have dealt upon the general custom of the realm with respect to carriers. Where a carrier means to limit his common law responsibility, he advertises his particular mode of dealing in the public papers, and affixes notices of it in his office and about the town where he dwells; and from these notices, as well as from parol evidence of the general notoriety of his mode of dealing, it may be presumed that the party who employed him, living within the reach of such information and notoriety, has the same knowledge which persons in general of the same place are thus proved to have had. The same sort of evidence then is as necessary where a carrier insists on extending his lien beyond the custom of the realm, in order to bring home the knowledge of such a particular mode of dealing to the party who employs him, from whence his implied assent to deal upon such terms may be inferred. In this view a few solitary instances of what other carriers have done at other distant places weigh little or nothing as to the point of inferring from them the knowledge of the bankrupt that such must

have been the mode of dealing of the defendants: and the rest of the evidence was defective both in the number and notoriety of the instances calculated to bring such knowledge home to him. Several of the instances do not apply, where the motive for having paid the general balance may be resolved into the convenience or benefit of the party applying for the particular goods; and the only strong instances are cases of insolvency and bankruptcy, where the relative magnitude of the respective claims of the carrier and consignee might induce a temptation to resist the carrier's lien; but these are very few either in number or importance, from whence to draw the conclusion of knowledge in the bankrupt.

Park and Wood contra. The evidence given was in conformity to the principle laid down by the Court in this case upon the former rule for a new trial, in support of the carriers' claim, and was not contradicted by any other evidence. The Court there thought that a general usage in trade affecting the custom of the realm ought to be proved by the practice of different carriers in different parts of the country; and that the knowledge of the individual customer might be inferred from the generality of the usage. The evidence therefore of the practice of the different carriers throughout all that part of the kingdom was material to the point in issue, and was the only proof which the nature of the case admitted of. There have been many instances, such as those of the dyers,^(a) the packers, &c., where liens for the general balance have been established by the general usage of trade even for twenty years before, which did not exist at common law, where the proof was of the same sort as in this case: and here the usage was carried back as far as 1775. It is in vain to say that a general usage in a trade will bind those who employ the traders, if the evidence, though uncontradicted, may be disregarded by the jury.

Lord ELLENBOROUGH, C. J. It is too much to say that there has been a general acquiescence in this claim of the carriers since 1775, merely because there was a particular instance of it at that time. Other instances were only about 10 or 12 years back and several of them of very recent date. The question however results to this, What was the particular contract of these parties? And as the evidence is silent as to any express agreement between them it must be collected either from the mode of dealing before practised between the same parties, or from the general dealings of other persons engaged in the same employment, of such notoriety as that they might fairly be presumed to be known to the bankrupt at the time of his dealing with the defendants, from whence the inference was to be drawn that these parties dealt upon the same footing as all others did, with reference to the known usage of the trade. But at least it must be admitted that the claim now set up by the carriers is against the general law of the land, and the proof of it is therefore to be regarded with jealousy. In many cases it would happen that parties would be glad to pay small sums due for the carriage of former goods, rather than incur the risk of a great loss by the detention of goods of value. Much of the evidence is of that description. Other instances again were in the case of solvent persons, who were at all events liable to answer for their general balance. And little or no stress could be laid on some of the more recent instances not brought home to the knowledge of the bankrupt at the time. Most of the evidence therefore is open to observation. If indeed there had been evidence of prior dealings between these parties upon the footing of such an extended lien, that would have furnished good evidence for the jury to have found that they continued to deal upon the same terms. But the question for the jury here was, whether the evidence of a usage for the carriers to retain for their balance were so general as that the bankrupt must be taken to have known and acted upon it? And they have in effect

(a) *Vide Savill v. Barchard*, 4 Esp. N. P. Cas. 53.

found either that the bankrupt knew of no such usage as that which was given in evidence, or knowing, did not adopt it. And growing liens are always to be looked at with jealousy, and require stronger proof. They are encroachments upon the common law. If they are encouraged, the practice will be continually extending to other traders and other matters. The farrier will be claiming a lien upon a horse sent to him to be shod. Carriages and other things which require frequent repair will be detained on the same claim; and there is no saying where it is to stop. It is not for the convenience of the public that these liens should be extended further than they are already established by law. But if any particular inconvenience arise in the course of trade, the parties may, if they think proper, stipulate with their customers for the introduction of such a lien into their dealings. But in the absence of any evidence of that sort to affect the bankrupt, I think the jury have done right in negating the lien claimed by the defendants on the score of general usage.

GROSE, J. This lien is attempted to be set up by the defendants, not upon the ground of any particular contract or previous transactions between them and the bankrupt, but on the ground of previous transactions between them and other parties, and between other carriers and their customers. And it is admitted that the question upon this evidence was properly left to the jury, that they might find a verdict for the defendants, if the usage for the carriers to retain for their balance of account were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage. The jury have found in the negative. And I take it to be sound law, that no such lien can exist except by the contract of the parties expressed or implied.

LAWRENCE, J. The most which can be said on the part of the defendants is, that there was evidence which might have warranted the jury to find the other way; but it was for them to decide. This is a point which the carriers need not be so solicitous to establish. It is agreed that they have a lien at common law for the carriage price of each particular article. If then it be not convenient for the consignee to pay for the carriage of the specific goods at the time of delivery, it is very easy for the carriers to stipulate that they shall have a lien for their balance upon any other goods which they may thereafter carry for him. It is not fit to encourage persons to set up liens contrary to law. The Carriers' convenience certainly does not require any extension of the law; for they have already a lien for the carriage price of the particular goods, and if they choose voluntarily to part with that, without such a stipulation as I have mentioned, there is no reason for giving them a more extensive lien in the place of that which they were entitled to. I should not be sorry, therefore, if it were found generally, that they have no such lien as that now claimed upon the ground of general usage.

LE BLANC, J. This is a case where a jury might well be jealous of a general lien attempted to set up against the policy of the common law, which has given to carriers only a lien for the carriage price of the particular goods. The party therefore who sets up such a claim ought to make out a very strong case. But upon weighing the evidence which was given at the trial, I do not think that this is a case in which the Court are called upon to hold out any encouragement to the claim set up, by overturning what the jury have done, after having the whole matter properly submitted to them.(1)(2)

Rule discharged.

(1) Vide *Oppenheim & al. v. Russell*, 3 Bos. & Pull, 42; *Butler v. Woolcott*, 2 New Rep. 64.

(2) [See Story on Bailments, 3d ed. 579.—W.]

Lundie v. Robertson.

7 East, 231. Feb. 10, 1806.

An indorsee, three months after a bill became due, demanded payment of the indorser, who first *promised to pay it if he would call again with the account*, and afterwards said that *he had not had regular notice, but as the debt was justly due he would pay it*: held that the first conversation being an absolute promise to pay the bill, was *prima facie* an admission that the bill had been presented to the acceptor for payment *in due time*, and had been *dishonoured*, and that *due notice* had been given of it to the indorsee, and superseded the necessity of other proof to satisfy those averments in the declaration; and that the second conversation only limited the inference from the former so far as the want of regular notice of the dishonour to the defendant went, which objection he waived.

THIS was an action by the indorsee against the indorser of a bill of exchange drawn on the 24th of September 1804, by J. Bell upon R. Atkinson, for 17l. 13s. in favour of R. Skokoe or order, at 65 days after date; which was accepted by Atkinson, indorsed by Skokoe to the defendant, and by the defendant to the plaintiff. The declaration contained the common averment, "*that when the bill became due, according to the tenor thereof, viz. on 1st of December 1804, the said bill, so accepted and indorsed, was presented to R. Atkinson for payment, which was refused; of all which said premises the defendant had notice, by means whereof, and according to the usage and custom of merchants, he became liable,*" &c. And it also contained, amongst other common money counts, one on an account stated. At the trial before *Chambre, J.* at Newcastle, a witness proved that in April 1805, he called by the plaintiff's desire on the defendant for payment of the bill then long past due. The defendant said, he had not cash by him at that time, *but if the witness would call in a day or two, and bring the account*, (by which was understood an account of the expences, a letter having been written and an affidavit of the debt made,) *he would pay it*. The witness then shewed the defendant the bill, which he took into his hand. And the witness called again in a day or two, when the defendant offered to give him a bill on London for the debt and expences, which the witness declined accepting. The defendant then said, *that he had not had regular notice, but as the debt was justly due, he would pay it*. No witness was called to prove that notice of the dishonour of the bill had been regularly given to the defendant; but the learned Judge, on objection being taken to the insufficiency of the evidence adduced, thought that the declarations of the defendant rendered any further proof in that respect unnecessary; and thereupon a verdict was given for the plaintiff; which was moved to be set aside in last Michaelmas term, upon the ground, that there was no evidence of the bill having been presented to the acceptor for payment when due, and refused; nor of notice to the defendant of the dishonour of the bill, as alleged in the declaration. And that the subsequent promise to pay the bill was made, for aught appeared, without knowledge of the fact of non-presentation of it by the plaintiff for payment when due, by which he had made it his own; and consequently the promise was void, as made under a mistake of the fact: or if available at all in respect of the prior consideration, it must be so as a new and special undertaking which ought to have been declared on specially, and could not operate to set up the bill again from which the defendant was once discharged by the plaintiff's laches.

Littledale now shewed cause. The fact that the bill when due was presented to the acceptor for payment, and refused, may be inferred by the jury from the circumstances of the case, viz. that the holder had the bill in his hands long after it was due, and that no objection was made by the defendant when it was tendered to him on the score of the non-presentation of it to the acceptor, but only that he had not had notice of the dishonour of it. But if

there were any doubt of that, the subsequent promise to pay is a waiver as well of that as of the other objection of want of due notice of the dishonour of the bill. And this is not like *Blesard v. Hirst*, 5 Burr. 2670, or *Goodall v. Dolley*, 1 Term Rep. 712; for in both those cases the circumstance unknown to the defendants, and which they could not be presumed to know at the time of the subsequent promise to pay, and which avoided such promise, was, that the bill had not been presented for payment; whereas here the bill was returned back to the defendant so long after it became due, that he must have known that something was wrong, and was therefore put upon his guard to make inquiries, if he were not already before apprised of the circumstances. And so far was the defendant from being taken by surprise, that the second time when the witness called by appointment, the defendant stated that *he had not had regular notice*, notwithstanding which, *as the debt was justly due he would pay it*. Whatever doubt, therefore, there might have been upon the first promise, the second must be taken to be an express waiver of all objection. Then, as to the effect of such a promise, supposing the defendant had been once discharged from his legal obligation to pay the bill by the laches of the plaintiff, it cannot be doubted that he might waive the want of notice, and promise to continue liable *upon the bill*; and such a promise dispenses with the proof of presentation for payment in due time to the acceptor, his refusal to pay, and due notice thereof to the defendant. The statute 3 & 4 Ann. c. 9, does not liquidate the debt for want of due notice; but there remains a good consideration for a subsequent promise: in like manner as a promise by a certificated bankrupt to pay an antecedent debt is good. But at any rate, the plaintiff would be entitled to recover on the count for the account stated.

Williams, in support of the rule, relied principally upon the objection that there was no evidence that the bill had been presented for payment in due time, which was alleged, and necessary to be proved by the plaintiff, and could not be presumed from the silence of the defendant. And this cannot be supplied by the subsequent promise; for according to the cases mentioned a promise to pay, made under ignorance of a fact which would discharge the defendant from all liability on the bill, will not set it up again. Now the plaintiff's having the bill in his hands three months after it was due merely raised a presumption that it had been dishonoured, but not that it had been presented for payment in due time. It might have been otherwise if the bill had been very recently over-due. The defendant might think it incumbent on him to waive the want of personal notice to himself in due time, if he supposed that the plaintiff had used all due diligence to get payment from the acceptor; and the subsequent promise is only a waiver of such notice; but the defendant cannot be presumed to have been cognizant of a fact which passed between the plaintiff and the acceptor; and therefore the promise can be no proof of the defendant's admission, that the bill was presented in due time; and if he were ignorant of that fact, the promise was nugatory. But even if he had known of the laches, the promise to pay could be no proof of the fact of such a presentation for payment, which being distinctly alleged must be proved, whatever other remedy might arise upon a promise so made. It could only have the effect of restoring to the plaintiff the right of action which he had lost by his laches, and putting him in a capacity to sue; but it could not supply the proof of a distinct allegation. Then the count for an account stated cannot be drawn in aid; for the trial proceeded altogether upon the count on the bill, and nothing was submitted to the jury upon the other count. And if the plaintiff be only entitled to recover on the promise, and not on the bill, he should have declared specially. Where one guarantees the debt of another the action is supported upon the promise itself, and it would not be competent to give the promise in evidence upon the common counts. 1 Saund. 211, n. 2.

Lord ELLENBOROUGH, C. J. The case does not admit of any doubt. The defendant is charged as the indorsee of a bill of exchange, and when applied

to for payment, he says he has no cash by him then, but if the witness will call again and bring the account with him, he will pay it. Now when a man against whom there is a demand promises to pay it, for the necessary facilitating of business in transactions between man and man, every thing must be presumed against him. It was therefore to be presumed *prima facie* from the promise so made, that the bill had been presented for payment in due time and dishonoured, and that due notice had been given of it to the defendant. But taking the subsequent conversation as connected with the former, the only limitation of it would be, that the defendant stated that he had not had regular notice of the dishonour; but even that objection was waived in the same breath; for the defendant said, that as the debt was justly due, he would pay it. Then it stands on the first conversation, as an absolute promise to pay the bill; thereby admitting (for I do not put it on the ground of waiver of any objection to the non-presentation of the bill in due time as existing in fact) that there did not exist any objection to his payment of the bill; but that every thing had been rightly done. That supersedes the necessity of the ordinary proof. And though an objection was stated in the second conversation to the want of regular notice, yet that objection was immediately waived. (1)(2)

Per Curiam,

Rule discharged. (a)

Iggulden v. May. (b)

7 East, 237. Feb. 11, 1806.

One, in consideration of 5l. 8s. in nature of a fine and of a yearly rent of 6s. 9d., demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture were contained." Held that this covenant was satisfied by the tender of a new lease for 21 years containing all the former covenants except the covenant for future renewal. And held, that an averment that the covenant for renewal in the indenture declared on corresponded with various other leases, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet *non constat* from this averment, that all the former leases contained the same covenant for renewal.

THIS was an action of covenant by the plaintiff, claiming by assignment from the original lessees, against the defendant claiming by assignment from the original lessor, upon a covenant contained in a certain indenture of lease, dated the 29th of September 1783, whereby one *John Dilnot*, in consideration of the payment of 5l. 8s. in the nature of a fine, and also in consideration of the yearly rent thereafter reserved, demised to *John Iggulden, Elizabeth Fleetwood, and Sarah Iggulden*, twenty-seven perches of ground, and the several messuages or tenements, outhouses, and buildings thereon, or on part thereof, situated in *Deal*, in the county of *Kent*, *habendum, &c.* unto the

(1) That where due notice has not been given, a subsequent promise to pay, under a knowledge of that fact, is a waiver of notice, see *Anson v. Bailey*, Bul. N. P. 276; *Rogers v. Stephens*, 1 Term Rep. 713. 718, 719; *Hopes v. Alder*, 6 East, 16 n.; *Whitaker v. Morris*, Esp. Dig. 58; *Wilkes & al. v. Jacks*, Peake's Ca. 203; *Potter v. Rayworth*, 13 East, 417; *Duryee v. Dennison*, 5 Johns. 248; *Miller v. Hackley*, 5 Johns. 375. 385. And it seems, that if an indorser pay part, it amounts to an implied promise to pay, and is a waiver of notice. *Vaughan v. Fuller*, 2 Stra. 1246.

(2) [See Chitty on Bills, 10th Amer. ed. 500, and cases in notes.—W.]

(a) "If an indorsee has neglected to demand of the drawer in a convenient time, a subsequent promise to pay by the indorser will cure this laches; by Lord Raymond, C. J. in *Haddock v. Bury*, Middlesex Trin. 3 Geo. 2." MS. Burnet, J.

(b) *Vide* this case in Equity, 9 Ves. jun: 326. Lord Chancellor retained the bill for a lease with a covenant for renewal, with liberty to bring this action.

lessees, their executors, &c. for the term of 21 years; *reddendum* yearly, during the said term, to *J. Dilnot*, his heirs, &c. the yearly rent of 6s. 9d. at *Michaelmas*. And that if the said rent should be in arrear for 14 days next after any *Michaelmas* day during the said term, it should be lawful for *J. Dilnot*, his heirs, &c. to enter and distrain, &c. And *J. Dilnot* for himself, his heirs, &c. covenanted and granted to the lessees, their executors, &c. "that the said *J. Dilnot*, his heirs and assigns, at the end of eighteen years of the said term of twenty-one years, or before, upon request to him or them made by the said *J. Iggulden*, E. F. and S. I., their executors, &c. and at the costs and charges of the said *J. Iggulden*, &c. their executors, &c. should and would make, seal, and deliver unto the said *J. Iggulden*, E. F. and S. I., their executors, &c. a new lease of the said 27 perches of ground, with the appurtenances, for the like fine or consideration of 5l. 8s., for the like time and term of 21 years, at the like yearly rent of 6s. 9d. payable as is aforesaid, with ALL covenants, grants, and articles as in the then present indentures were contained," (meaning the said indenture now brought here into court as aforesaid, and the counterpart thereof.) By virtue of which demise the said lessees entered and became possessed for the said term; the reversion thereof belonging to *J. Dilnot* in fee. The declaration then stated, that the said term during the continuance of it became vested in the plaintiff through several mesne assignments, and that the reversion of the premises became vested in the defendant in fee by conveyance. And then the plaintiff averred, that the aforesaid indenture of lease contained no other covenant, grant, article or clause than such as are herein-before set forth, and that the covenants, grants, and articles in that indenture contained *correspond* (except as to the date and names of the parties) with those expressed in various other leases before then successively made and executed of the premises comprised in the said first-mentioned indenture by the owners for the time being of the inheritance thereof, on renewals from time to time granted by such owners, at the like yearly rent of 6s. 9d., in consideration of a like sum of 5l. 8s. paid in the nature of a fine upon every such renewal. And then the plaintiff assigned as a breach, that after the assignment of the reversion to the defendant, and whilst the plaintiff continued so possessed of the demised premises, and before the end of 18 years of the said term of 21 years granted by the said indenture, viz. on the 21st of September 1801, (he the now plaintiff) gave notice to the defendant of the demised premises having been so assigned to the plaintiff, and requested the defendant, as assignee of the reversion, at the costs of the plaintiff, to give him a new lease of the premises, for the like fine of 5l. 8s., for the like term of 21 years, at the like yearly rent of 6s. 9d., payable, &c. with all covenants, grants, and articles, as in the said indenture of lease were contained, and particularly with such covenant for renewal as is contained therein, under the like terms as expressed in that indenture, according to the form and effect of the same. And though the plaintiff was ready and willing, and offered to the defendant to pay the costs of such new lease, and to pay him such fine of 5l. 8s., yet the defendant did not give him such new lease with all covenants, &c., but on the contrary refused to make the plaintiff a new lease containing any covenant for further renewal, contrary to the form and effect of the said indenture and covenant, &c., to the plaintiff's damage of 1000l.

The defendant by his plea, after craving oyer of the indenture of demise, and protesting that the covenants, grants, and articles therein do not correspond with those expressed in various other leases before them successively made of the premises comprised in that indenture by the owners for the time being of the inheritance thereof, upon renewals from time to time granted by such owners, as in the declaration is alleged; pleaded, that since he became seised of the reversion, and the plaintiff became possessed of the residue of the said term, he the defendant has been and is willing to grant the plaintiff a new lease of the premises, with all such covenants, grants, and articles as in

the said indenture of demise are contained, *excepting only the covenant for renewal*. And then he stated, that, when so requested, he did make to the plaintiff a new lease with all such covenants, &c., except only the covenant for renewal; of which he gave notice to the plaintiff, who refused to accept the same. The plea then set forth *verbatim* the new lease so made and tendered by the defendant, (which was the same as the former, excepting the covenant for renewal;) and averred, that the premises comprised in the latter were the same as those in the former indenture. To this there was a general demurrer, and joinder.

This case was argued in *Easter* term last, by *Marryat* in support of the demurrer, and *Abbott*, contra. But as the Court in giving judgment went very fully into the case, and noticed the principal arguments; and as all the authorities which were cited are collected in the report of the same case in the Court of Chancery, in 9 Ves. jun. 325, and in Mr. *Hargreave's* argument in the case of *Lord Inchiquin v. Burnell*, Harg. Jur. Arg. 411, it is unnecessary to repeat them. The case stood over for consideration till this term, when

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court. After stating the pleadings—The question arising upon the whole of the record is, Whether the plaintiff were entitled to have a lease executed to him *containing the covenant of renewal*? And which question itself depends upon the intent of the parties, as it is to be collected from an instrument inaccurately framed, and from its shortness affording little matter from whence arguments can be drawn to explain its meaning.

The rules of construction applicable to covenants are so well known, that it is hardly necessary to cite authorities to shew that every covenant is to be expounded with a regard to its context; that such exposition must be upon the whole instrument *ex antecedentibus et consequentibus*, and according to the *reasonable sense and construction of the words*. Plowd. 329. In conformity to which rules, and in support of the apparent intent of the parties, covenants in large and general terms have been frequently narrowed and restrained. The cases of *Cage v. Paxton*, 1 Leon. 116, and *Broughton v. Conway*, Moor 58, are authorities to this effect. Having referred generally to these cases for the ground upon which the present may be decided, it is to be seen whether that part of the covenant relied on by the plaintiff, viz. "to grant a new lease with *all* the covenants of the then granted lease," is not to be narrowed so as to except that particular covenant. And though some attempts were made in argument to shew that the indenture itself contained some particulars from which *an intention to covenant* for a perpetual renewal might be collected, they appeared to us of too slight a nature to afford any solid foundation for such an inference; and that the case necessarily resolves itself into this question, viz. whether a covenant to grant a new lease with *all* covenants can be satisfied by a lease with *all* covenants *except the covenant for renewal*. The argument, that a covenant for a lease with *all* the covenants cannot be satisfied by a lease with *all but one*, will have no weight, if according to the fair construction of the lease, that one covenant should be found to have nothing to do with the subject-matter to be granted. The covenant is, "at the end of 18 years of the term of 21 years" granted by the lease, to grant "a new lease for the like time and term of one-and-twenty years, with *ALL* covenants, grants and articles, as in that indenture contained." The subject-matter therefore of the grant is *one* lease, not many: for a new lease is the same as *one* new lease: and if the parties intended to contract for one lease, there can be no doubt that the covenants to be introduced must be commensurate with the duration of such lease, and suited to the subject-matter of the grant. And the words, "with all covenants, grants and articles, as in the then present indentures were contained," so understood, amount only to a loose and general mode of expressing in substance, what follows, viz. "with all such provisions relative to the enjoyment of the *new*

"lease for 21 years as are contained in the present lease, relative to the now subsisting term of 21 years." If the continued grant of successive leases, and not the grant of one only, were intended, it is natural to expect that words should have been used distinctly marking a right of repeated renewal, instead of expressions more immediately applicable to the case of a single additional lease. The argument for the defendant rests upon that which is not the natural construction of such a covenant: it is a construction which, without any apparent consideration for a grant in such extent, leads virtually to a grant in perpetuity: whereas the other construction leads only to a single renewal for the same period of time; and therefore is a much more reasonable construction, and *prima facie* more entitled to adoption on that account than the former. The case on the part of the plaintiff supposes that it was the intention of the parties to express what, if they had so intended, might have been expressed, without difficulty or ambiguity, by words which would have obviously occurred to the most unexperienced draftsman. Had the words, "and so from time to time," been added after "at the end of 18 years of the said term of 21 years or before," this design in the parties would have been easily and unequivocally pointed out. Possible cases may be put in which a grant, such as the plaintiff contends for, would be by no means unreasonable or absurd; as the case which was put in argument on this question in the Court of Chancery: that this might be originally unprofitable sea beach; and that it might be a good bargain for the owner to part with it, without any prospect of increasing his fine, in as much as while the leases were renewed, the gain, though small, would be certain, and when they were at an end, the lessor's possession would not be worse than it was originally: and that on the other hand it was but reasonable that if the experiment did not answer, the lessee should be at liberty to give up the spot at the end of the 21 years originally granted. But the answer to this and other supposed cases of the like kind appears to be, that if such had been the views of the parties they would not have suffered their intention to rest on words of so ambiguous an import as those in question. Persons so attentive to their eventual interests, as such parties must be supposed to have been, would hardly have provided for them by words so ill calculated to ascertain and secure the object they had in view as these appear to be. The argument built on the use of the word *covenants*, in the plural number, has not much weight; for independently of the observations which I have already made on the loose and general language of this provision, and the fair import of the whole of it taken together, the word *covenants* is in this case literally satisfied by the lessor's granting a lease with a covenant for good title, and quiet enjoyment, on his part, to the lessee; and the lessee himself being bound by no other covenant on his part than that contained in the first indenture, viz. to pay the rent; with power of entry and distress. On the cases which have been cited for the plaintiff it will not be necessary to say much; for the words of all of them differ from that in question; and in most of them an intention of perpetual renewal may be fairly collected from the context. The only case on the subject, which has yet been decided in a court of common law, is the case of *Cook v. Booth*, Cowp. 819; which is certainly a case very analogous to the present, both in respect of the words of covenant, on which the claim to perpetual renewal is founded, and also in respect of the fact of successive renewals of a lease similar in terms with the one claimed. In that case, however, the series of successive renewals from the first downwards was *uniform and unbroken*: in this case, it is only alleged that *the covenants correspond* with those in *various* other leases successively made: which allegation as to *various* other leases might be true, although there should have been several instances to the contrary. That case was decided upon two grounds; first, that the parties themselves had, by successive renewals of the lease, in all of which the covenant of renewal had been uniformly repeated in the same

terms, put their own construction upon this covenant: and upon this first ground the judgment of Lord *Mansfield*, Mr. Justice *Willes*, and Mr. Justice *Ashhurst*, proceeded. The second ground, (and on this the judgment of Mr. Justice *Buller* proceeded,) was, that the authority of *Bridges v. Hitchcock*, (1 Bro. P. C. 522,) decided the case then in question. As to the first of these grounds, inasmuch as the fact stated respecting the successive renewals is so materially different in this case from the statement in *Cook v. Booth*, this case cannot be governed thereby; even if it were competent "in any form of action to bring upon the record *the fact*, with reference to the former leases, as explaining the contract contained in the last lease;" upon which point very grave and serious doubts have been entertained, and which it is not now necessary to decide, (I allude to what was said by Lord *Eldon*, in 9 Ves. jun. 335, and by the present Master of the Rolls, in *Moore v. Foley*, 6 Ves. jun. 238.) As to the second ground, the authority of the case of *Bridges v. Hitchcock*, (and upon which Mr. Jus. *Buller* thought the case of *Cook v. Booth* ought to be decided,) will not govern the present: for that, as has been observed in argument, did not turn upon the covenant to grant under the same covenants: but had this additional circumstance, viz. that the covenant was to grant *such* further lease as the lessee should desire. So that the covenant left it to the lessee himself to say, *what interest he would require* to be granted to him, without any restriction or limitation, except, that no covenant should be introduced not contained in the original lease. Nor was it unfair to infer from thence that he, who might have asked a lease for any number of years, did not exceed what was intended by requiring one with a covenant to renew. In *Furnival v. Crewe*, 3 Atk. 84, the words were "One or more lease or leases, and so to continue the renewing such lease or leases;" words plainly importing a repetition of renewals; and on them Lord *Hardwicke* relied. But in this case there is not one word which indicates continued renewals. In the cases of *Hyde v. Skinner*, 2 P. Wms. 196, before Lord *Macclesfield*, *Russel v. Darwin*, before Lord *Camden*, *Tritton v. Foot*, before Lord *Thurlow*, 2 Bro. 636, and *Moore v. Foley*, 6 Ves. jun. 232, before Sir *Wm. Grant*, there was a covenant to renew: but in all of them it was holden, that there should be no perpetual renewal. And though these cases were decided in courts of equity, yet they were cases in which the Judges sitting in those courts were bound to put the same construction upon the instruments under consideration as courts of law. Upon these authorities, therefore, as well as upon the reason of the thing, we are of opinion, that the plaintiff was not entitled to require the execution of a lease to him containing the covenant of renewal; and therefore that our judgment must be for the defendant. (1)

Judgment for the Defendant.

Crosse et Uxor, Administratrix of Reeder, v. Smith and Munt,
Executors of Grierson.

7 East, 246. Feb. 11, 1806.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of *plene administravit* to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt.

TO debt on a bond in the penalty of 1000*l.*, given by *James Grierson* to

(1) [See 2 New R. 449, in the Exchequer Chamber, where the judgment of the King's Bench was affirmed. Also, *Harnett v. Yeilding*, 2 Scho. & Lef. 549, 555. *Dowling v. Mill*, 1 Mad. 541.—W.]

John Reeder, dated 10th of *May* 1793; conditioned for the payment of 500*l.* and interest at 5 per cent. on the 10th of *May* 1796, the defendant *Munt* pleaded *plene administravit*, except as to 468*l.* 15*s.* 0*d.*: and, as to that sum his bankruptcy and certificate; and specially alleged, that the said 468*l.* 15*s.* and no more of the effects of *Grierson*, having been received by him as such executor, were, before he became bankrupt, misapplied, eloiigned, and wasted by him. That the plaintiff, administratrix after *Reeder's* death, and before her marriage with the other plaintiff *Crosse*, proved the said 468*l.* 15*s.* as a creditor under *Munt's* commission, as a debt due from *Munt*, as such executor, to her as the administratrix of *Reeder* at the suing out of the commission, and secured by the bond in the declaration mentioned; and that a dividend was duly declared and made under such commission, of which the plaintiff, administratrix, had notice. To this plea of the defendant *Munt* the plaintiffs replied, denying that he had fully administered, except 468*l.* 15*s.*; and also denying that the plaintiff, administratrix, proved the said 468*l.* 15*s.* as a creditor under *Munt's* commission, as a debt, &c. secured, &c., in manner and form as alleged by the plea; and on these points issue was joined. The defendant *Smith* pleaded, 1st, *plene administravit*, except as to 4*l.* 17*s.*; and 2dly, *plene administravit*, except the said 4*l.* 17*s.*, before he had notice of the bond; and that he had not then, nor had at the time when he first had notice of the said writing obligatory, or at any time since, goods, &c. except the said 4*l.* 17*s.* To this the plaintiffs replied, taking judgment of the assets confessed; denying that the defendant *Smith* had fully administered except 4*l.* 17*s.*; and as to his second plea, they said that the defendant *Smith* had at the time when he had first notice of the said writing obligatory, besides the said 4*l.* 17*s.*, goods, &c. to the amount of the debt: and on these points also issue was joined. This cause was tried before Lord *Ellenborough*, C. J., at the sittings after *Trinity* term 1805, when a verdict was found for the defendant *Munt*, and for the plaintiffs against the defendant *Smith*, damages 1*s.*; and that the defendant *Smith* had assets, *ultra* the 4*l.* 17*s.*, to the amount of 400*l.* only; subject to the opinion of the Court on the following case.

Grierson, the deceased, duly executed the bond to *Reeder* deceased at the time it bears date, and paid 100*l.* on it in his lifetime, and died on the 17th *January* 1796; having made his will, and appointed the defendants executors, who proved the will and administered. The defendant *Smith* lived, and still lives, at *Southampton*, where *Grierson* lived, and the defendant *Munt* resided in *London*. Early in *February* 1795, *Reeder* wrote to the defendant *Munt*, apprising him of the amount of the bond and of the sums remaining unpaid, and requiring payment thereof. On the 17th of the same *February*, the defendant *Smith*, having 400*l.* of *Grierson's* effects then in his hands, as his executor, remitted that sum to the defendant *Munt* his co-executor, for the purpose of paying this bond, of which he had had notice from *Munt*, as appeared by the following letter written by the defendant *Smith* to *Reeder*. "Mr. *Smith's* compliments to Mr. *Reeder*, and begs to inform him he remitted Mr. *Munt* "400*l.* to pay his bond on the 17th *February* 1795, by a draft on Messrs. "Whiteheads, bankers, in *London*, and that Mr. *Munt* acknowledged the receipt thereof the 19th ditto. *Southampton*, 28th *July* 1796." No other evidence was given of the defendant *Smith's* knowing of the bond, or the terms of the condition. At the time of the remittance *Munt* was in good credit, and *Smith* knew that he was a simple contract creditor of *Grierson* to a larger amount than 400*l.* *Munt* applied the 400*l.* towards the payment of the simple contract debt due from *Grierson* to him; though he knew of this bond, and had received the 400*l.* from *Smith* to pay it. *Munt* became bankrupt on the 4th of *July* 1796, as stated in the pleadings. *Reeder* died in *October* 1797, intestate, leaving the plaintiff administratrix his only daughter, who took out administration to him. On the 21st of *November* 1798, the plaintiff administratrix proved the money then due for principal and interest

on the bond, being 468*l.* 15*s.*, as a debt under *Munt's* commission, whereon a dividend has been declared, of which she had notice, as stated in the pleadings. *Munt* has obtained his certificate. *Munt* had no assets of *Grierson* in his hands at the time he became a bankrupt on which the plaintiff administratrix could found the proof of a debt against him, as having committed a *devastavit* to the amount so proved, without including the money he had so received from *Smith*. She knew the 400*l.* had been remitted by *Smith* to him for the purpose of paying the bond at the time she proved the debt under the commission. Subsequent to all these proceedings, and before the commencement of the action, the plaintiffs intermarried. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover against the defendant *Smith*? If the Court should be of opinion that they were, then the verdict to stand; if not, then a verdict to be entered for the defendant *Smith*.

Dampier for the plaintiffs. The defendant *Smith* must stand upon the plea of *plene administravit*: and then the questions will be, 1st, Whether, excluding any idea of *Munt's* bankruptcy, this be an administration by *Smith*? 2dly, Whether this demand be barred by *Munt's* certificate, or on the ground of the plaintiff administratrix having adopted *Smith's* payment to *Munt*? 1st, In *Churchill v. Hobson*, 1 Salk. 318, and 1 P. Wms. 241, in Equity, the distinction was taken that where two trustees join in a receipt, and only one receives the money, the other is not liable: but where two executors join in an acquittance, and one only receives the money, both are chargeable for it as to creditors, who are to have the utmost benefit of the law; but only the actual receiver is liable to legatees or persons claiming under distribution who have no remedy but in equity: for the substantial part is the receiving the money which alone is regarded in equity. There indeed the plaintiff who had paid money into the hands of his co-executor, who afterwards became bankrupt, was relieved; but Lord Chancellor *Harcourt* relied principally on the circumstance that such co-executor had been the testator's banker, and entrusted by him with the custody of his money in his lifetime. Now here the plaintiff is a creditor, and the defendant is an executor, and not merely a trustee, and the money was at one time in the hands of the defendant. And this is the case of a *devastavit* by the co-executor, and not merely that of a failure. It is no objection that the bond was not due at the time; for it was payable notwithstanding before a simple contract debt. *Lemun v. Fooke*, 3 Lev. 57. Neither is there any clause in this will, that one executor shall not be answerable for the default of another, which was relied on by Lord Northington in *Westley v. Clarke*; (a) and there the money was never in the power of the co-executor. The principle however of all the cases (with one exception) is, that where by the act or agreement of one executor the testator's effects come to the hand of a co-executor, the former shall be answerable for his companion, the same as if he had enabled a stranger to receive them. This was laid down in *Gill v. The Attorney-General*, Hardr. 314, and confirmed in *Sadler v. Hobbs*, 2 Bro. Chan. Rep. 116, by Lord *Thurlow*, who examined all the cases, and disapproved of the exception made by Lord Northington in *Westley v. Clark*. All the cases were again revised by Lord *Alvanley*, when Master of the Rolls, in *Scurfield v. Howes*, 3 Bro. Chan. Rep. 60; who, though he thought that an executor merely joining his co-executor in a receipt was not in all cases conclusive in equity, yet admitted that he was liable where he had actually received the money, and entrusted it to the other who failed. The only case which leans the other way is *Balchen v. Scott*, 2 Ves. jun. 678, where an executor who had proved the will, but did not act, having received a bill of exchange by the post from a debtor to the estate, which he immediately sent to the acting executor, was holden

(a) Cited in a note to *Fellows v. Mitchell*, 1 P. Wms. 83, by Mr. *Cox*.

by Lord *Loughborough*, C. not to be chargeable. But that was in the case of a residuary legatee, and therefore falls within the distinction in *Churchill v. Hobson*. And the executor sought to be charged never acted; but here the defendant acted as well as *Munt*; for it is stated that *they administered*. Besides, that case was very little discussed. In *Bacon v. Bacon*, 5 Ves. jun. 331, one executor living in *London* had paid money to his co-executor living in the country, where the testator had also resided, in order to pay debts contracted in the neighbourhood, which were likely to be best known to such co-executor who had been the confidential agent and attorney of the testator: under which circumstances the Lord Chancellor held him not liable: but there was also an express clause in the will that neither of the executors should be liable for the act, receipt, or default of the other; which was relied on in *Westley v. Clarke*. And none of those excepted cases were so strong as this, where the money was at one time in *Smith's* hands, who had taken upon him to administer, and who trusted it to *Munt*, knowing that he was a simple contract creditor, and that if the estate were not solvent he was interested in making away with it. Then supposing *Smith's* handing over the money to *Munt* not to discharge him on the plea of *plene administravit*, the second question is, whether *Munt's* certificate can be a bar to this action against *Smith*? Executors have a joint and entire interest in all the goods of the testator, and any suit against them must be joint, otherwise they may plead in abatement. But though the demand be *prima facie* joint, one executor may discharge himself by shewing an administration by him, or other legal discharge. Now *Munt's* bankruptcy and certificate are only a discharge of himself; for by stat. 10 Ann. c. 15. s. 3, it is provided, that no person who stands jointly bound with the bankrupt shall be thereby discharged. And as the assets came into *Munt's* hands by *Smith's* assent, the receipt in that case is joint, according to the doctrine in *Gill v. The Attorney-General*, Hardr. 314. The objection that the plaintiff has discharged *Smith* by resorting to *Munt's* estate, supposes their separate remedies to be inconsistent: but that is not so; for whatever is obtained by the plaintiff under *Munt's* commission is so much in aid of *Smith*. As in case of a bill of exchange, the indorsee may pursue his remedy against all whose names are on the bill, so that upon the whole he does not recover more than the amount of the bill. So these are concurrent remedies.

Marryat contra. The stat. 10 Ann. only extends to joint contractors, which does not apply to executors. The case *Ex parte Llewellyn, Co. Bank*. L. 168, 3d edit. shews that a debt of this sort, contracted by an executor who has wasted the goods of his testator, is proveable under the executor's commission; and, being so, is discharged by his certificate. And the exercise of the option of so proving the debt by the plaintiff administratrix under *Munt's* commission operates to preclude any remedy which *Smith* might otherwise have had against *Munt*, however it may exonerate *Smith* as to so much of the debt as may be recovered under *Munt's* commission. The principal question, however, is, how far payment by one co-executor to another of part of the assets of their testator, with a view to a regular course of administration, and in consequence of the application of the bond creditor to such other co-executor for payment, can be considered as a *devastavit*? The payment to the co-executor was induced by the application of the creditor himself to such co-executor, from whom it was more convenient to him to receive it. It would be injurious to creditors in general, if each executor were obliged to pay to the respective creditors their proportions of the assets collected by himself: additional delay and expence would be induced. There is no authority in a court of law for making such a *bona fide* transfer of the assets from one co-executor to another a *devastavit*; and the later decisions in equity are against it, which have much relaxed the ancient strict rule binding executors for each others' acts. Joining in a written receipt for assets was formerly holden to make a

co-executor liable, though he did not in fact receive the money; but now it seems that whatever he does *bona fide* in laying out, or remitting money, or lodging it with a banker whose solvency is not questionable at the time, it will discharge an executor; and that he shall only be answerable for breach of trust or palpable negligence in administering the effects. The opinion in *Gill v. The Attorney-General*, Hardr. 314, was an *obiter dictum*. Lord Northington, in *Westley v. Clarke*, 1 P. Wms. 83, n., first exonerated an executor who had merely joined in giving a receipt from liability to answer for the application of the money by his co-executor who had in fact received it. And in *Churchill v. Hobson*, 1 P. Wms. 241, even while the strict rule prevailed, Lord Harcourt held that it did not bind an innocent co-executor as against legatees: and he there held that an executor was entitled to his discharge who had lodged assets received by him in the hands of the same banker who had been employed by his testator, though he afterwards failed. And in *Sadler v. Hobbs*, 2 Bro. Chan. Cas. 114, the executor who was holden liable for the misapplication of the assets by another, had conducted himself very improperly: he had joined with his co-executor in drawing the money out of a solvent house, and putting it into the hands of another house in which the co-executor was a partner, where it was suffered to remain for several years, till they became insolvent: and soon after such transfer the first executor received from the house of his co-executor a large sum in which they were indebted to him before; from whence an undue motive for the transfer might be inferred. So in *Scurfield v. Howes*, 3 Bro. Chan. Rep. 90, where the party acted more as trustee than as executor, there was also a direct violation of the trusts of the will. The mortgage-money, when paid off, was directed to be laid out in government securities, and the co-executor and trustee who joined in the receipt and reconveyance suffered the money to remain in other hands. Since the opinion of Lord Thurlow in *Sadler v. Hobbs*, it has been decided in the two cases of *Balchen v. Scott*, 2 Ves. jun. 678, and *Bacon v. Bacon*, 5 Ves. jun. 331, that the mere putting of assets into the hands of an executor will not make him liable for the subsequent misapplication of his co-executor. In the first of these the one executor actually received a bill by the post, which he immediately transmitted to the acting executor. In the other case the one executor had transmitted the money to his co-executor in the country, who had been a confidential agent of the testator, for the purpose of paying the testator's debts there; which was deemed sufficient for his discharge. The ground of the decision was, that the payment was made in the usual course of business, and no blame or negligence was imputable to the solvent executor. And the same rule prevails in the case of a receiver appointed by the Court of Chancery, 3 Atk. 480; *Knight v. Ld. Plymouth*. It is agreed that if goods be impaired in the hands of an executor without his default he is not liable, 6 Mod. 181. [Lord Ellenborough asked what would be the case if an executor were robbed?] An executor is not liable more than a common bailee; and he would certainly not be liable in case of a robbery.

Dampier, in reply, said, that a joint obligation arose out of the joint receipt of the executors, and therefore the case came within the stat. 10 Ann.; and that the plaintiffs having proved the debt under *Munt's* commission could not prejudice *Smith*, though it might favour him; for if as between the two executors *Smith's* demand against *Munt* existed before the act of bankruptcy he might have proved it under the commission; if afterwards, the certificate was no bar. That the inconvenience of executors playing the money of the testator into each other's hands would be much greater to creditors in general than making each executor personally accountable for what he actually received proportionably to each creditor. And that upon a review of all the cases the general rule appeared to be, that an executor was liable to account for what he actually received, unless he could excuse himself by special circumstances, such as had been admitted, though not without question, in some of the cases:

but at any rate, that those equitable circumstances, if they existed at all, however they might operate to induce a court of equity to give an executor his discharge, could be no defence at law, where the fact of the receipt of assets by an executor was conclusive against him, unless he could shew a due administration of them under the plea of *plene administravit*.

Lord ELLENBOROUGH, C. J. said, it was a case of the first impression in a court of law, and very fit to be maturely considered. The case therefore stood over till this term, when his Lordship delivered the judgment of the Court.

After stating the record and case; the only material question in this case is, whether *Smith* the defendant, having once as executor of *Grierson* deceased had 400*l.* of *Grierson* in his hands, liable to the payment of *Reeder's* bond debt to the plaintiff, for which this action is brought, and capable of being so applied, is discharged in point of law, by having paid that money over to his co-executor *Munt*, for the purpose of being applied by such co-executor in payment of this bond; but who was afterwards guilty of a *devastavit* in respect thereto? Another point was made in argument as to the effect of the partial satisfaction which the plaintiff's wife *Eliza Laurence Crosse* obtained against the defendant *Munt*, by a proof and dividend under his commission upon the same sum of money. But as that can unquestionably operate in point of law no further than as an extinction of the plaintiff's debt *pro tanto*, i. e. to the amount of the dividend received from the other executor *Munt*, who was jointly liable with the defendant *Smith* for the entire sum, and not as a bar to this action as against *Smith*, it is unnecessary to occupy further time in the consideration of so clear a proposition.

It has heretofore, in many cases, been made a question, where by the act or agreement of one executor money gets into the hands of his companion, the other executor, whether both shall be answerable? In *Sadler v. Hobbs*, 2 Bro. 116, Lord *Thurlow*, founding himself upon the case before Lord *Hale*, then Ch. Baron, in *Hardres*, 114, *Gill v. The Attorney-General*, was of opinion, that if one executor put money into the hands of his companion, he shews that he had it in his power to secure it, and that his companion, for some reason, was permitted to obtain possession of the money. In *Westley v. Clarke*, (in Mr. *Cox's* notes on *Fellows v. Mitchell and Owen*, 1 P. Wms. 83,) Lord *Northington* had held a doctrine more favourable to executors: he laid the main stress on *the act of receiving the money*. He says, "The material part of this transaction is *the receiving of the money*, which was by one *Thompson* only; the other signing the receipt is only form. I am therefore of opinion and declare, that the defendants *Clarke* and *Betts* (the other executors) are not liable to make good the sum of 600*l.* (the sum not accounted for by *Thompson* the bankrupt executor), *no part of which came to their hands*; the same having been received by *Thompson* the bankrupt." It appears therefore from this, that the ground upon which alone the other executors were holden exempt from a responsibility for this sum, was the fact of their having received no part of it. And that if the money had come to their hands also, Lord *Northington* would have holden them equally liable with the other executor for what they had received. And Lord *Alvanley*, when Master of the Rolls, in the case of *Hovey v. Blakeman*, 4 Ves. jun. 608, says, that he perfectly concurs in *Westley v. Clarke*, the above mentioned case before Lord *Northington*. And the doubt almost in every case seems to have been, whether an executor joining in a receipt, or doing some other necessary act to enable his companion to receive, be chargeable as if he had himself received; there never being any question made what would have been the effect of his own personal receipt and possession of the assets. It never has been made a doubt in any case at law, that if money has, in the language of the plea, "*come to the executor's hands to be administered*," that it must also have been in fact applied by him in a due course of administration in order to his dis-

charge. And it never has been thrown out in any case that I can find before that of *Bacon v. Bacon*, 5 Ves. jun. 33, (which however was not the case of a creditor plaintiff,) that it is sufficient "if the business were transacted in the ordinary manner, unless there were some circumstance to awaken suspicion." It would indeed follow from that doctrine, that an executor was to be considered, as the defendant's counsel ventured to contend he should be, i. e. as a mere ordinary bailee; an idea probably then for the first time suggested in a court of law. As no case at law has yet decided, that an executor once become fully responsible by actual receipt of a part of his testator's property, for the due administration thereof, can found his discharge in respect thereof, as against a creditor seeking satisfaction out of the testator's assets, either on the score of inevitable accident, as destruction by fire, loss by robbery, or the like, or reasonable confidence disappointed, or loss by any of the various means which afford excuse to ordinary agents and bailees in cases of loss without any negligence on their part; I say, as no such case in respect to executors has yet occurred in a court of law, we are not from the particular hardship of the present case authorised to make such a precedent in favour of this defendant. In conformity, therefore, to the rules of law as handed down to us in respect to executors, we are obliged to pronounce that the defendant *Smith*, having once received and fully had under his controul assets of the testator applicable to the payment of this bond debt, was responsible for the application thereof to that purpose: and such application having been disappointed by the misconduct of his co-executor whom he employed to make the payment in question, he is liable for the consequences of such misconduct as much as if the misapplication had been made by any other agent of a less accredited and inferior description: and that therefore the verdict, which has in this case been found against the defendant *Smith*, must stand.

Judgment for the Plaintiff.(1)

Roe, on the Demise of E. Child, and Mary his Wife, v. Wright.

7 East, 259. Feb. 11, 1806.

The word *estate* will carry a fee in a will, if not restrained by other words; and held that it was not restrained in a devise of "all my estate, lands, &c. known and called "by the name of the *Coal Yard* in the parish of *St. Giles, London*."

IN ejectment, for certain houses and premises called *the Coal Yard*, in the parish of *St. Giles*, in the county of *Middlesex*, which was tried before Lord *Ellenborough*, C. J. at *Westminster* after last *Michaelmas* term, a verdict was entered for the plaintiff, subject to the opinion of the Court on the following case.

James Camper being seised in a fee of the premises in question, and also seised and possessed of other freehold, copyhold, and leasehold estates in *Essex*, *Middlesex*, and *Huntingdonshire*, by his will duly executed, dated 28th of *January* 1763, devised as follows. "As touching such worldly and personal "estate wherewith it hath pleased God to bless me, I give, devise, and dispose of the same in the following manner. *Imprimis*, I give and devise "unto my loving wife *Sarah Camper* all my lands, houses, &c. freehold, copyhold, and leasehold whatsoever and wheresoever, and to receive the rents and "profits thereof during her natural life, and also all my deeds, mortgages, "bonds, and writings, and also all my stock, goods, chattels, effects, and personal estate whatsoever and wheresoever; she paying thereout the legacies "hereinafter given and disposed of. And I do hereby appoint my said wife

(1) [See acc. *Walker v. Symonds*, (by Ld. Eldon,) 3 Swanst. 64. *McNair's Appeal*, 4 Rawle, 157. *Serrett's Appeal*, 2 Penn. R. 422. *Peter v. Beverly*, 10 Pet. 532. See also, *McIntyre v. Morris*, 14 Wend. 90.—W.]

"sole executrix of this my will. And after her natural life, I do hereby order, direct, give, devise, and bequeath all my lands, houses, &c. freehold, copyhold, and leasehold, in manner following: I give and devise unto my grandson *James Wright* all my lands, freehold, copyhold, and leasehold, in the county of *Essex*, (except herein excepted and reserved the house I now live, with all the lands, yards, outhouses, stables, and all other conveniences and appurtenances thereunto belonging and to be hereinafter disposed of.) Also I give and devise unto my grandson *James Wright* all my estate, freehold and copyhold, lying and being in the town of *Ellington* in *Huntingdonshire*. And also I give, devise, and bequeath unto my grandson *John Wright* all my estate, lands, &c. known and called by the name of the Coal Yard, in the parish of Saint Giles, London. Also I give unto my grandson *John Wright* 500*l.*, to be paid in six months after my decease. Also I give and devise unto my grandson *James Camper* the house I now live in, with all the lands, yards, outhouses and all the appurtenances belonging to the same, and also all my houses and lands, commonly called and known by the name of *Castle Yard*, in *Holborn, London*, and now in the tenure or occupation of *George Oldmixon, Esq.* Also I give and devise unto my grandson *James Camper* 500*l.*, to be paid when he shall attain his age of 21 years." The testator died on the 30th of *January* 1763, leaving *Sarah Camper* his widow, and his three grandsons, *James Wright*, *John Wright*, and *James Camper*, named in his will him surviving; which *James Camper* was also his heir at law. Upon the death of the testator *Sarah Camper* the widow entered into and continued in possession of the premises, together with the other property devised to her during her life. Upon her death, *John Wright* entered into possession of the said houses and premises, called the *Coal Yard*, in the parish of Saint Giles, Middlesex, and continued possessed until *May* 1805, when he died; leaving the defendant *James Camper Wright*, his heir at law; who on the death of *John Wright* took possession of the premises, and held them at the time of the demise and ejectment. *James Camper*, the testator's grandson and heir at law, died in 1768, intestate as to the premises in question; leaving *Mary* the wife of *E. Child* (one of the lessors of the plaintiff) his only child and heir at law, and also the heir at law of the testator. The question for the opinion of the Court was, whether the lessors of the plaintiff were entitled to recover? If they were, the verdict was to stand; if not, a nonsuit was to be entered.

Marryat, for the lessors of the plaintiff, contended that by the devise to the testator's grandson *John Wright* of "all his estate, lands, &c. known and called by the name of the Coal Yard, in the parish of St. Giles, London," the fee did not pass, but only a life estate. There are indeed introductory words, as touching the deviser's worldly and personal estate; but they are satisfied by his having given a life estate in all his property to his widow; after which follow fresh words of introduction, "and after her natural life," &c., which do not indicate an intention to pass the fee to the devisees in remainder; and there are no words of limitation annexed to the devise in question. The only question then is, Whether the word *estate*, coupled as it is with other explanatory words, be sufficient to carry the fee? The devisor by the introductory words devises "all his lands, &c. in manner following;" what follows then is merely an indication of the several persons amongst whom the lands were to be distributed: and though words of amplification may be used, they still refer to the things themselves which he had so expressed his intention to dispose of, and not to the quantum of interest which he had in the several properties. He explains what he means by the word *estate* by the words *lands, &c.*: and still further to shew that he only intended the word *estate* as a local description of the thing, he adds, "known and called by the name of the Coal Yard," &c. In the former case of *Doe v. Wright*, (a) on

(a) 8 Term Rep. 64 and vide S. C. *Doe d. Wright v. Child*, 1 New Rep. 335.

another clause of the will devising the estate in *Essex* to *James Wright*, only an estate for life was holden to pass; and though the word *estate* does not occur in that devise, and the force of that word in general to pass a fee was acknowledged; yet from the insertion of it in one clause and the omission of it in another coupled with it, devising two estates to the same person, without any apparent intention to convey a greater interest in the one estate than in the other, and still further when coupled with, *Hogan v. Jackson*, Cowp. 306, and explained by the word *lands*, which is also used in the second introductory words, it is apparent that the devisor did not use the word *estate* in its largest legal signification, but in its ordinary local one. If the devisor had given *all his estate in the Coal Yard*, that would have shewn that he meant to convey all his interest in the estate. In *Tuffnell v. Page*(a) a devise of "*my estate AT KIRBY HALL*" was indeed decreed to carry a fee; but there were preliminary words denoting the devisor's intention to settle *all the estate which he had*: and there the word *estate* stood alone and not explained by the local word *lands*; and so it did in *Holdfast v. Marten*, 1 Term Rep. 411, where, however, the Court relied much on the use of the same word in the residuary clause to convey the fee. Then if the operating words of the devise, taken altogether, are not in themselves sufficient to carry the fee, the first introductory words, supposing them to override the whole will, cannot have that effect: as in *Doe d. Small v. Allen*, 8 Term Rep. 497, where a devise of "*all my messuages, lands,*" &c. in *S. to A.* were holden to carry only a life estate, though preceded by introductory words "*as to what real and personal estate it has pleased God to bless me with.*"

Williams, Serjt., contra, contended that the word *estate* in itself carries a fee, and according to what was said by *Holt*, C. J. in *Countess of Bridgewater v. Duke of Bolton*, 6 Mod. 106, and 1 Salk. 236, and by *Buller*, J. in *Holdfast v. Marten*,(b) requires words of restraint to make it carry a less estate; and that here neither the words "*lands, &c.*" nor the designation of the estate *by the name of* the Coal Yard did so restrain it; but that it stood as a devise of "*all my ESTATE in the parish of St. Giles,*" &c. which according to all the authorities was a designation not only of the *thing*, but of the devisor's interest in it; as in *Wilson v. Robinson*, 2 Lev. 91, and 1 Mod. 100, where the devise was of "*all my tenantright estate at B.*" &c. and in *Barry v. Edgeworth*, 2 P. Wms. 523, where a devise of *all my land and estate in Upper Catesby to W. E.* was deemed to carry the fee; for otherwise, as was said, the word *estate* would have no effect, as the word *lands* was enough to carry the state for life. In *Bailis v. Gale*, 1 Ves. 48, the devise was of "*all that estate I bought of Mead.*" in *Ibbotson v. Beckwith*, Cas. in Eq. temp. Talb. 157, it was of "*all my estate at N. (and in N. was said to be the same as at N.)*"; in *Tuffnell v. Page*, 2 Atk. 37, it was of "*my estate in Kirby Hall to A. S. and after his death to W. T. my estate at Kirby Hall;*" and in *Tanner v. Wise*, 3 P. Wms. 294, it was of "*all the rest of my estate,*" &c.: and in all these cases the fee was holden to pass. Lastly, he referred to *Cole v. Rawlinson*, Salk. 234, where the devise was of "*my estate, right, title, and interest, &c. in whatever I hold by lease from J. F., and also the house called the Bell Tavern, to J. B.*" and three Judges (against one) read the will as if it had been "*I give all my estate, &c. in the house called the Bell Tavern to*

(a) 2 Atk. 37. The distinction was also alluded to, which had been once taken, between the words *my estate in A. and my estate at A.*; but the opinion of *Ld. Talbot* in *Ibbotson v. Beckwith*, Cas. Temp. Talb. 157, and that of *Ld. Hardwicke* in *Goodwyn v. Goodwyn*, 1 Ves. 228, were said in answer to have gotten rid of that subtlety. And it was observed, that in the latter case the addition of the words "*in the occupation of such a tenant,*" was not considered by *Ld. Hardwicke* as restraining the general legal effect of the word *estate*. And *Williams*, Serjt. noticed that the supposition of the contrary by *Lord Kenyon* in *Fletcher v. Smiton*, 2 Term Rep. 659, referring to the case in *Vesey*, was a mistake.

(b) 1 Term Rep. 414, and vide *Doe v. Burnesall*, 6 Term Rep. 34.

J. B.," and held that *J. B.* took a fee in the *Bell Tavern*. And he added, that when the devisor meant to give only a life estate, as in the prior devise to his wife, he had expressly said so.

Marryat, in reply, said, that in none of the cases cited, where the word *estate* was holden to carry the fee, were there any words of restraint and locality coupled with it, such as the words *land called, &c.*, except in *Barry v. Edgeworth*; and there the word *land* preceded the word *estate* which shewed an intention to give the whole interest in addition to the land itself. And in *Cole v. Rawlinson* there were even words of amplification, such as *right, title, and interest*, in addition to the word *estate*. After time taken by the Court to look into the authorities cited,

Lord ELLENBOROUGH, C. J. now delivered judgment. The question is, Whether under these words in a will, "I give, devise, and bequeath unto my grandson *John Wright* all my estate, lands, &c. known and called by the name of the Coal Yard, in the parish of Saint Giles, London," the devisee took an estate in fee, or for life? The lessors of the plaintiff, of whom *Mary* is heir at law of the testator, contend that the devisee took only an estate for life: the defendant, who is heir at law of the devisee *John Wright*, contends that he took an estate in fee. It is admitted by the counsel for the lessors of the plaintiff, that the words *all my estate*, in a will, in general comprehend not only the thing, or subject matter of the devisee, but the interest in it, and give a fee to the devisee, unless the effect of these words be restrained or qualified by the context. But he contends, that the effect of them is so restrained and qualified in the present instance; and that the words "*lands, &c. known and called by the name of the Coal Yard, in the parish of St. Giles, London,*" which immediately follow the word *estate*, are to be understood as merely descriptive of the name and local situation of the thing or subject of the devise, and not of the devisor's interest therein: and that the word *estate*, thus accompanied, has no other effect than the words, "*lands freehold and copyhold,*" in an antecedent part of this same will have already, by a decision of this Court, and also since of the Court of Common Pleas, been allowed to have, in the case of *Doe dem. Child et Uz. v. Wright*, 8 Term Rep. 64, and in that of *Doe dem. Wright v. Child et Uz.*, 1 New Rep. 335, where they were holden to carry a life estate only. The general effect of the words "*all my estate*" in a will, or even where those words are coupled with others limiting them in point of place; as, *all my estate in or at a certain specified place*, has been so fully settled by most of the various cases cited for the defendant, as carrying a fee; viz. by *Wilson v. Robinson*, before Lord Hale, in 2 Lev. 91, and 1 Mod. 100; *Countess of Bridgewater v. The Duke of Bolton*, 6 Mod. 106, and Salk. 236, before Lord Holt: by *Barry v. Edgeworth*, 2 P. Wms. 524; *Ibbetson v. Beckwith*, Talbot 157; *Tuffnell v. Page*, 2 Atk. 37; *Goodwyn v. Goodwyn*, 1 Vesey, 228; and lastly, in the case of *Holdfast v. Marten*, 1 Term Rep. 411, (and which last case, with the exception of the residuary clause in that case, is nearly in terms with the present; that it is unnecessary to add any observations upon them to those which have been made at the bar. Considering therefore the words "*all my estate,*" in the language of Mr. Just. Buller in *Holdfast v. Marten*, as the most general and effectual words that can be used to pass a fee; "and that so far from its being necessary to add words of inheritance, in order to make it pass a fee, words of restraint must be added in order to carry a less estate;" this question will then turn solely upon the supposed words of restraint in the present instance. And I cannot but consider the words "*lands, &c.*" which follow the word *estate*, as descriptive only of the subject-matter in which the general interest predicated before by the word *estate* consisted; and as tantamount to "*all my estate in lands,*" &c.; or, to "*all my estate in lands, houses, or whatever else it may be:*" and between the words, "*all my estate, lands,*" &c. in this case, and the words "*all my land and estate,*" in the case of *Barry v. Edgeworth*,

there seems to be no material difference in point of reason and effect, so as to require a different construction. The vice of the plaintiff's construction is, that *estate* and *lands, &c.* must be made to mean the same thing as *lands only*, in order to defeat the effect of the word *estate*: whereas, according to the defendant's construction, each word will have its proper signification; namely, the word *estate* as expressive of the entire interest; *lands* as expressive of the particular subject-matter or particular kind and quality of the thing in which such entire interest subsists. Supposing therefore that the proper and natural effect of the word "*estate*" is not restrained by the words "*lands, &c.*" which immediately follow it, the only remaining question will be, whether it be so restrained by the words "*called or known by the name of the Coal Yard, in the parish of St. Giles?*" But if those words be applied to the word *estate* standing in its general and unrestricted sense, they will collectively amount to no more than this; viz. "all my estate in the lands, &c. in *St. Giles's* parish, called the *Coal Yard*." And this is not going much further than was done by Lord *Hardwicke* in respect to similar words of locality in *Tuffnell v. Page*, 2 Atk. 37; which words were, "*my estate in Kirby Hall, near Hennington Castle, by Henningham town*;" upon which Lord *Hardwicke* observed, "that the word *estate* was sufficient to pass not only the land, but all the interest the testator had in it besides: for though here is a locality in *Kirby Hall*; yet the testator meant his interest in it too." But supposing that in this last case the locality is to be referred solely to *Kirby Hall*; yet in *Goodwyn v. Goodwyn*, 1 Ves. 228, Lord *Hardwicke* said, that a devise of "all the testator's estates in *A.*" would carry a fee; "and that there was no reason why the words" in the occupation of *B.* and *D.* "should restrain it more than *the locality which would not.*" And in this sense, giving a proper effect to each word in the sentence, it appears to us that these words may be understood, and thereby the actual intent of the testator be effectuated, who probably meant in this case, as testators usually do, to give the entire interest in the subject of the devise, where no words are used which expressly denote an intention to give a less interest therein.(1)

Judgment for the Defendant.

Doe, on the several Demises of Everett and Others, v. Cooke and Others.

7 East, 269. Feb. 11, 1806.

One devised a leasehold for a long term after the decease, &c. of *S. K.* to *T. C.* for life, remainder to his child or children by any woman whom he should marry, and his or their executors, &c. for ever, upon condition that in case the said *T. C.* shall die an infant, unmarried, and without issue, the premises to go over to his father *W. C.* and his three other children share and share alike, and their heirs, executors, &c. Held that the devise over depended upon one contingency, viz. *T. C.'s* dying an infant, attended with two qualifications, viz. his dying without leaving a wife surviving him, or dying childless; and that the devise over could only take effect in case *T. C.*, died in his minority leaving neither wife nor child; and here it failed, *T. C.* having attained 21, and married before his death. Though the devise of a term to one for life, with a contingent remainder over, will in general only entitle the first taker to a life estate if the remainder over do not take effect, and the residue of the term will go to the personal representative of the testator: yet the testator's intent appearing to be to dispose of the whole from his executors, held that the lessors of the plaintiff, who claimed under his will, were entitled to recover after the death of *T. C.* without issue.

IN ejectment for lands in the parish of *Butleigh* in the county of *Somerset*,

(1) Vide 6 Cruise's Dig. 244. et seq. *Lambert's* lessee v. *Paine*, 3 Cranch. 97. *Jackson d. Decker & al. v. Merrill*, 6 Johns. 185. *Hungerford v. Anderson*, 4 Day. 368. The word "*estate*" in the preamble of a will may be incorporated in the devise and pass a fee. *Kennon v. M'Roberts & Uz.*, 1 Wash. 96. *Davies v. Miller*, 1 Call 127. *Watson v. Powell*, 3 Call 306.

on the several demises of *William Everett*, *Mary Mears*, and *Jane Cook*, all laid on the tenth of *April* 1805, which was tried before *Graham, B.* at the last assizes at *Bridgewater*, a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

Thomas Browning, being possessed of a leasehold interest in the premises in question for a long term of years still unexpired, by his will, dated, the 17th of *January* 1760, devised the premises as follows: "Also I give, devise, and bequeath, the use and occupation of a dwelling-house and outhouses lying in *Butleigh*, &c. with a close, &c. adjoining, called *Kehways*, with the rents, issue, and profits thereof, to *Thomas Cooke*, son of *William Cooke*, of *Butleigh*, husbandman, by *Elizabeth* his late wife, deceased, to hold to him the said *Thomas Cooke* and his assigns from and immediately after the death of *Susannah Kehway*, widow, or the day of her marriage again to any other husband, which shall first happen, for and during the term of his natural life: and after his decease, I give and devise the same to the child or children of the said *Thomas Cooke*, to be begotten by him on the body of any woman or women that he shall hereafter intermarry with, his, her, and their executors, administrators, and assigns, for ever. But my will is upon this further condition, that in case the said *Thomas Cooke* shall die an infant, unmarried, and without issue, then I do hereby give and devise the said dwelling-house, outhouses, and close, &c. unto the said *William Cooke*, and his three other children by the said *Elizabeth Cooke* his late wife, deceased, share and share alike, as tenants in common and not as joint-tenants, his, her, and their heirs, executors, administrators, and assigns, for ever." *Thomas Browning* died shortly afterwards. *Susannah Kehway*, mentioned in the will, died soon after the testator. *Thomas Cooke* entered on the premises in question, and afterwards married *Jane Benjafeld*, one of the lessors of the plaintiff, held the premises to his death, and died in *February* 1802; never having had any issue, and being about 46 years old. *William Cooke*, named in the will, the father of *Thomas* and of the defendants *John Cooke* and *Rebecca Coombs*, died on the 10th of *March* 1764. *John Cooke* and *Rebecca Coombs*, the defendants, are two of three children of the said *William Cooke* by *Elizabeth* his then late wife, mentioned in the will, and are in possession of the premises in question; the other was *Mary Callow*, who has been dead some time. The lessors of the plaintiff claim under *Thomas Browning's* will, and are entitled to the premises in question if the limitation to *William Cooke* and his three children by *Elizabeth Cooke* be void under the facts stated. The question for the opinion of the Court was, Whether the plaintiff were entitled to recover? If so, the verdict was to stand: if not, a nonsuit was to be entered.

This case was argued by *Pell* for the lessors of the plaintiff, and *Dampier* for the defendants; but as the arguments turned altogether on the intention of the testator, and the most material of them were afterwards noticed by the Court in giving judgment, it is unnecessary to repeat them here. The former referred to *Barker v. Suretees*, 2 Stra. 1175; *Price v. Hunt*, Pollexf. 645; *Frankingham v. Brand*, 3 Atk. 390, and 1 Wils. 140; *Forth v. Chapman*, 1 P. Wms. 663; *Porter v. Bradley*; (a) *Bigge v. Bensley*, 1 Bro. Chan. Rep. 187; *Beauclerk v. Dormer*, 2 Atk. 312; *Saltern v. Saltern*, 2 Atk. 376; *Target v. Gault*, 1 P. Wms. 432, and *Fairfield v. Morgan*, in Dom. Proc. 1805, and mentioned in reply *Baile v. Coleman*, 2 Vern. 671, and *Doe v. Burnsall*, 6 Term Rep. 30. The latter cited *Goshawke v. Chicgell*, Cro. Car. 154, and *W. Jones*, 205, and *Woodward v. Glasbrook*, 2 Vern. 388. The case stood over for consideration a few days, and

(a) 3 Term Rep. 143. It was observed now by *Lawrence, J.* that *Ld. Kenyon*, whatever doubts he might have thrown out in this case of the propriety of the distinction originally taken in *Forth v. Chapman*, did not deny it to be law; and referred to his lordship's opinion subsequently expressed. Vide *Daintry v. Daintry*, 6 Term Rep. 314, and *Roe v. Jeffery*, 7 Term Rep. 589.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court. On reading this will, though there may be reason to think that the testator meant, in case *Thomas Cooke* died at any time, without leaving children, that the estate in question should go to *William Cooke* and his three other children; yet we do not think we can put such construction on it: for had the testator's intent been such, nothing would have been more easy than to have expressed it without any ambiguity: but instead of limiting the estate to go over in that event, the contingency is thus expressed: "My will is, in case the said *Thomas Cooke* shall die an infant, unmarried, and without issue, then I give the said dwelling-house to *William Cooke* and his three other children." Now if the Court should confine the estates going over to a dying without issue, they must reject the words "*infant, unmarried.*" If they should retain them, and read them as the counsel for the defendant contended they should be read, viz. "if he die an infant, or die unmarried, or being married, die without issue," this would be in effect reading the will, as if it had given the estate over on any one of these single events; of course upon the event of his dying without issue: or it would be a mode of reading it not consistent with the supposition that it was the intent of the testator at all events to give over the estate to *William Cooke* and his children; if *Thomas Cooke* should die without issue: because that mode of reading the will would introduce the contingency of his marriage, and defeat the limitation over, though he had no children. And this difficulty will occur, whether you construe the word "*unmarried*" as meaning without ever having been married, or as meaning not being married at the time of his death. The will certainly cannot be read as if it had been, "If he dies an infant, or unmarried, or without issue;" for then the condition would be in the disjunctive throughout; in which case the rule is, "*Quod in disjunctivis sufficit alteram partem esse veram*:" and if *Thomas Cooke* had died in his infancy, leaving children, the estate would have gone over to *William Cooke* and his children, to the prejudice of those of *Thomas*; which could not have been the intent of the testator. The most rational construction we can give this will is to construe it, as Lord *Hardwicke* did the devise in *Framlingham v. Brand*, 3 Atk. 390, as one contingency; viz. *Thomas Cooke's* dying an infant; attended with two qualifications; viz. his dying without leaving a wife surviving him, or, dying without children. Had he left a wife, and had died an infant, and no children, the testator might have intended, that in such event the widow should be benefited by taking her share under the statute of distributions with the next of kin, or that *Thomas Cooke* should be able to make a testamentary disposition in her favour: meaning also, that if he left children, they should have the estate in preference to the wife: and that if he left neither wife or children at his death during his minority, that *William Cooke* and his children should have the estate: but that if he arrived at the age of 21, he should have a power to dispose of it, though he left neither wife or children. In putting this construction on the will the limitation will be read, as if the bequest had been "to *Thomas Cooke* for life, and in case he die an infant unmarried and without issue, then I give the said dwelling-house to *William Cooke* and his children; but if *Thomas* have any children, I give the same after his decease to his children." The contingency upon which the estate was to go over was to consist of three things, the death of *Thomas Cooke* during his infancy, without leaving wife, or child: and, as *William Cooke* and his children appear to have been the objects of the testator's bounty next to *Thomas Cooke* and his family, it would be very strange to suppose that the testator introduced into his will contingencies, which might defeat *William Cooke's* interest, without an intention of conferring some advantage on *Thomas Cooke*; and that he meant, if *Thomas Cooke* died an infant leaving a wife and no children, or should die after he attained the age of 21, that the limitation over should fail, without any advantage whatever resulting to *Thomas Cooke*. And though the

disposition of a term to one for life, with a remainder over, will in general entitle the first devisee to no greater interest than an estate for his life, if the remainder should not take effect, and the residue of the term will go to the personal representatives of the testator; yet this rule will not hold, if it appear that the testator's intention was to dispose of the whole from his executor's, which we think was the intention of the testator in this case. And it being admitted in the statement of the case that the lessors of the plaintiff are entitled, if the limitation to *William Cooke* and his three children cannot take effect in the events which have happened, we are of opinion that there must be judgment for the plaintiff.

Postea to the Plaintiff.

Payne v. Whale.

7 East, 274. Feb. 11, 1806.

After a warranty of a horse as sound, the vendor, in a subsequent conversation, said, that if the horse were unsound (which he denied) he would take it again and return the money. This is no abandonment of the original contract, which still remains open; and though the horse be unsound, the vendee must sue upon the warranty, and cannot maintain *assumpsit* for money had and received to recover back the price, after a tender of the horse.

THIS was an action for money had and received, to recover back the price of a horse which had been warranted sound by the defendant to the plaintiff. Shortly after the original bargain was made, (of which there was no proof except by the subsequent conversation,) and the money paid, the plaintiff objected that the horse was a roarer and unsound, and tendered back the horse, and demanded his money: the defendant admitted that he had made the warranty, but denied the unsoundness, and refused to take back the horse or return the money; but told the plaintiff that if the horse were unsound, he would take it again and return the money. At the trial after last Trinity term at Guildhall, these facts were proved, and that the horse was a roarer and unsound. But it was objected on the part of the defendant, that the action was misconceived; for that the question to be tried was the unsoundness, which was the subject of the warranty, and could not be tried in this action, the contract not being rescinded, but only in a special action on the case founded on the warranty. Lord *Ellenborough*, C. J. however, then thought that the special promise to rescind the contract and return the money, if the horse were unsound, took this out of the general rule; and he therefore suffered the plaintiff to recover a verdict for the amount of the price paid. And in *Michaelmas* term last, a rule nisi was obtained for setting it aside, and having a new trial, upon the authority of *Power v. Wells*, Cowp. 318, and *Weston v. Downs*,^(a) which established the principle, that where the contract of warranty is still open, *assumpsit* for money had and received will not lie by the vendee to recover back the price of the goods warranted; though in the latter case there was a similar promise to take back the horses warranted, if the plaintiff disapproved of them and returned them within a month; which was offered to be done, but refused. The case stood over to this term, when

Garrow and *Marryat* shewed cause against the rule, and referred to *Towers v. Barrett*, 1 Term Rep. 133, where the contract being that the plaintiff should pay 10 guineas for a horse and chaise, on condition to be returned if his wife should not approve of it, he paying 3s. 6d. a day for the hire of it: and his wife not having approved of it, the plaintiff returned it in three days, and tendering the hire of it; it was holden that he might maintain *assumpsit* for money had and received to recover back the price paid: and yet the wife's

(a) Dougl. 23. See also *Hull v. Heightman*, 2 East, 145.

dissent was as much to be tried in that case, as the soundness was here. [Lawrence, J. There the plaintiff had an option by the original contract to rescind it, if not approved of by his wife; but here it was no part of the original contract that the horse was to be taken back again and the money returned, if it did not turn out to be sound. The defendant only said so afterwards, when it was objected by the plaintiff that the horse was unsound, the contrary of which was insisted upon by the defendant. This distinguishes the two cases.] They then endeavoured to assimilate the cases more, by contending that there was no evidence of the original contract but what was to be collected from the subsequent conversation: and that the whole was to be taken together as forming one contract, or as evidence of what had passed between the parties in the first instance. [But *Le Blanc*, J. said, it was evident that the subsequent conversation amounted only to a recognition by the defendant that he had in the first instance warranted the horse to be sound; which he still insisted was sound: but being pressed by the objection of the plaintiff, he then promised if it were unsound to take it again and return the money.] They then insisted, that though the promise were made at a subsequent time, it had reference to the original contract, and was incorporated with it.

Erskine and *Lawes* in support of the rule. If the defendant were entitled, as it must be admitted that he was, to offer evidence of the soundness of the horse, it is clear that the contract was still open; and then the question could not be tried in this form; but the plaintiff can only sue upon the special contract, the breach of which he insists upon on the one hand, and the defendant denies on the other. The subsequent promise can make no difference, for it is no more than the law would have implied if the warranty were broken. [Lord *Ellenborough* observed, that strictly speaking the promise was not exactly what the law would say in such a case; for the promise was to take the horse again if unsound, and return the money; but the law would say, that the party failing in his warranty should be answerable in damages. But that it was still open to the defendant to contend that the action should have been on the special undertaking.] In *Towers v. Barrett*, by the very terms of the original contract the defendant had no option to refuse taking back the chaise and horse in the event of the wife's disapprobation. But here the defendant insisted, as he had a right to do, on his performance of the original contract, which he never agreed to rescind. Though if the subsequent conversation could be considered as amounting to a new contract, the objection would still remain that it ought to have been declared upon; for it was conditional, *Heyling v. Hastings*, 1 Salk. 29; and the question of soundness was still open to be disputed.

Lord *ELLENBOROUGH*, C. J. then said, that as the cases ran very near to each other, and this would give the rule to many others, the Court would consider of the case before they gave their opinion; as they wished to proceed upon some sound and clear principle which would not break in upon established cases which had become the habitual law of the land, such as actions of this sort against stakeholders, or for returns of premium. That if the question were upon the warranty, there was no doubt that the action was misconceived: the only doubt was, whether the promise to take back the horse if unsound, and return the money, did not make a difference.

His Lordship now shortly delivered the opinion of the Court.—This was a cause tried before me at *Guildhall* to recover back the price of a horse sold as a sound horse, and which proved to be unsound. It was to be collected from the evidence, that there had been a warranty of soundness at the time of the original contract of sale: but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. And it was contended that the action for money had and received would not lie, upon the authority of *Power v. Wells*, and *Weston v. Downes*, because this was no other

than a mode of trying the warranty, which could only be by a special action on the case. It had occurred to me at the trial, that the defendant, by means of his promise to return the money and take back the horse if it were unsound, had placed himself in the situation of a stakeholder, and therefore that on proof that the horse was unsound he was to be considered as holding the money for the use of the plaintiff. But upon further consideration I am clearly satisfied that that promise did not discharge the original warranty, and that the party complaining of the breach of that warranty must still sue upon it. The second conversation is not to be considered as an abandonment of the original warranty, the performance of which the defendant still insisted upon; but rather as a declaration that if the warranty were shewn to be broken, he would do that, which is usually done in such cases, take back the horse and repay the money. Then where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action upon the warranty. Nonsuit to be entered.

Roe, on the Demise of Charles Prideaux Brune, Clerk, v. Rawlings.

7 East, 279. Feb. 11, 1806.

Where *A.*, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate; which letter the tenant for life indorsed "*A particular of my estate*" &c. and handed down to *B.* the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail; held that such paper was evidence for the tenant in tail against a lessee of *B.* in order to shew that the rent reserved by *B.*, the tenant for life, was less than the ancient rent which was reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz. to diminish the rent in order to increase his fine upon renewal under the power. And held also that entries by *A.* the tenant for life, in his book of the receipt of the rent to the amount stated, were also evidence of the same fact.

IN ejectment for certain lands in the parish of *Padstow* in *Cornwall*, the lessor of the plaintiff produced a deed of settlement of 1728, whereby the lands in question, among others, were settled on *Edmund Prideaux* the elder for life, remainder to *Edmund Prideaux* the younger for life, remainder to *Humphrey Prideaux*, eldest son of *E. Prideaux* the younger, for life, remainder to his *first* and other sons in tail male; and the lessor of the plaintiff was the first tenant in tail under that settlement. *E. Prideaux* the elder died soon after the settlement made in 1728. *E. Prideaux* the younger succeeded him, and died in 1745: when *Humphrey Prideaux* came into possession, and continued so till his death in 1793, whose eldest son, the lessor of the plaintiff, then came into possession. The settlement contained a leasing power, whereby any tenant for life was enabled "from time to time, by indenture under his hand and seal, to make grants, leases, or demises, of or for all or any part or parts of the demesne lands, whereof he should be in the actual possession, for any term of years not exceeding 21 years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives be at any one time in being in any part of the premises, and so as the ancient yearly rent, or a proportionable part thereof, be reserved." The defendant claimed under a lease of the premises for 99 years determinable on three lives (still extant), granted in 1778 by *Humphrey Prideaux*, the last tenant for life under the settlement, described as the east part of a tenement called *Trevethan*, at the yearly rent of 14*s.* with a heriot of the best beast, or 3*l.* for the same, on the dropping of each life; which lease was contended by the present

tenant in tail to be void as not pursuant to the power, inasmuch as (*inter alia*) the *ancient yearly rent* was not reserved. And to prove it his attorney was called as a witness: who produced, first, a paper writing found amongst other papers and muniments relative to the estate in settlement at the mansion-house of the lessor. This paper purported to be a letter, dated in *January 1728*, from one *Hobart* to *Edmd. Prideaux* the younger, named in the settlement, then resident in the *Close* at *Norwich*, where it was directed to him; and on the outside was indorsed "*Jan. 25th 1728-9. From Hobart, a particular of my estate in Cornwall.*" The contents of the letter were as follows: "*Manerium de Padstow.* Conventional rents due yearly to *Edmd. Prideaux, Esq.*" [Then followed a long list of names of tenants, and their tenements, with the amount of their several rents, continued in line, extending through the whole of the first and part of the second side of the letter; after which follows.]

"Hond. Sir—You have here inclosed an account of all the yearly rack rents, which are payable quarterly, and the value of the wood and casualties with the rents, according as my deceased master and myself computed it *communibus annis*: and you have likewise an account of all the conventional rents set at least for three lives, both of the manor of *Padstow* and *Huston*, with the two out-leases in *Launceston* and *St. Stephens*; the which I hope will be satisfactory to you. Here are on the place several things which you cannot well be without, and *Madam Glynn* and her son are very willing, as they said, that you should have them at a reasonable value; viz. two ricks of hay, six hhds. of beer, &c. with other small things, and I desire to know whether the books are yours or the executors. I am, honoured Sir, &c.

Padstow, 23d Jan. 1728-9.

Stc. Hobart."

(Then follows, on the third side of the letter) "*January 1728-9. An account of the estates set at a yearly rent within the parish of Padstow, belonging to Edmd. Prideaux Esq. (under which is a list of the names of the tenements in one column, of the tenants in another, the covenants for years in a third, the years unexpired in a fourth, and the rents in a fifth. Amongst which are these two items; the first of which was contended to be the premises in question)*

"Part of <i>Trevethan</i> ,	<i>John Hellyar</i> ,	21	20	£14 0
"Another part of <i>Trevethan</i> ,	<i>Malachy Spear</i> ,	7	5	12 5

(the whole amount of these last-mentioned yearly rents are 94*2l. 9s.*) The same witness also produced an account-book of *Edmd. Prideaux* the younger, found in the same place as the letter, in which were the following entries: "*John Hellyar*, part of *Trevethan*, for 21 years from Michaelmas 1727, per annum 14*l.*—cleared all to Michaelmas 1734." Then followed various entries of sums received by *Edmd. Prideaux* the younger from *John Hellyar* in respect of the rent of 14*l.* and concluding with "Total to Michaelmas 1738, 14*l.*" Another entry was "*Sept. 29th 1726*, demised to *Malachy* and *Thomas Spear* two fields, the west part of *Trevethan*, for 7 years, 12*l. 5s.*" Then followed entries of receipt of rent from these tenants at that rate down to Michaelmas 1733: and then "*July 20th 1735*, demised the west part of *Trevethan* to *H. Williams* for 14 years from Michaelmas 1735, 12*l. 5s.*" from whom an account was in like manner kept of receipts of rent to Michaelmas 1741. The indorsement on the letter and the entries of the receipt of rent from the tenants were offered in evidence as a recognition of *E. Prideaux* the younger, tenant for life, by whom they were made(a), that the yearly rent of the tene-

(a) The proof of this was by comparing the hand-writing of the indorsement and entries with the hand-writing of the signature of *E. Prideaux* the younger to the deed of settlement. The same proof was again admitted by *Le Blanc, J.* at the second trial before him at *Launceston* Spring assizes 1806, who said, that at this distance of time no better evidence of the fact than comparison of hands could be obtained, and that he had no doubt it was proper to be received. There was a verdict for the plaintiff on the se-

ment in question was truly described in the letter addressed to him, and that both the letter and the entries in the books preserved amongst the muniments of the estate by the successive owners of it, and transmitted from one to the other, were evidence of the fact, even as against the defendant, who claimed under the last tenant for life, that the ancient rent of the premises in question was 14*l.* and not 14*s.*, which latter was the rent reserved under the defendant's lease. To this it was answered by the defendant's counsel, that the letter in question amounted to no more than hearsay evidence from a stranger of a fact of which there must be better evidence. That the writer of it, supposing him to stand in the relation of a steward to *Edmund Prideaux* the younger, which did not appear, must have obtained his information, if accurate, from the counterparts of the leases: which were the best evidence, and might have been produced; and that the paper not binding himself by the acknowledgment of the receipt of rent, which would have been evidence against himself, and a pledge of his accuracy, it did not fall within any of the cases where stewards' accounts had been received in proof of such a fact against third persons. That the indorsement of *E. P.* the younger, to whom it was addressed, did not shew that he had adopted the statement, but merely that such a letter had come to his hands. But that at any rate, if it were evidence against him, yet the subsequent tenant for life, by whom the defendant's lease was granted, who claimed as a purchaser, and between whom and *E. P.* there was no privity of estate, could not be bound by the latter's acknowledgment. Thereupon the plaintiff was nonsuited.

In *Michaelmas* term last, a rule nisi was obtained for setting aside the nonsuit and having a new trial, on the ground that the evidence of the letter and of the entries was improperly rejected. They were said to be family muniments handed down with the estate from one owner to another, in which all the tenants for life were interested, and preserved as such by each of them in succession: and they were compared to expired leases, which, though granted by former owners, were evidence for subsequent purchasers of the title, possession, and identity of the property so leased. On a former day, in this term,

Burrough and *East* shewed cause against the rule. As to the letter from *Hobart*, it does not appear that he was steward of the estate at the time to the person to whom it was addressed; it is rather to be collected from the contents that he stood in that relation to the prior owner, for he speaks of his late master: he was therefore, for aught appears, a stranger to the estate at the time of writing the letter, and as such had no peculiar duty to discharge in acquiring or giving more accurate information than any other: and no greater authenticity was given to the contents of the letter by the indorsement of the then tenant for life than they were intrinsically entitled to; it amounted to no more than an acknowledgment of his having received such a letter; nor unless the paper be evidence *per se* can the preservation of it with the title deeds of the estate make it evidence. It has never been considered that the owner of an estate admits the truth of every letter and paper preserved amongst his muniments. Then as to the paper itself, it is no more than a parol declaration made by a former steward of the estate to the then owner, as to what was the amount of the ancient rent of a certain part of the estate; which would not have bound even the then tenant for life, and much less a subsequent one claiming as a purchaser. The steward must have collected this information, if true, from the counterparts of the leases, which were the best evidence of the fact, and ought now to have been produced, or their non-production at least accounted for, before secondary evidence could be admitted. This goes far beyond any of the decided cases. The general rule is,

cond trial. [As to comparison of hands see the editorial notes to *The King v. Calor*, 4 Esp. 273, a. (Day's edit.) to *Macfarson v. Thoylas*, Peake's (Ca. 21. (Day's edit.) and the cases of *Tiford v. Knott*, 2 Johns. Ca. 211, and *Jackson d. Van Dusen v. Van Dusen*, 5 Johns. 144.]

that *res inter alios acta* is not admissible in evidence. The exception has never yet been carried further than to admit the act of a third person, a stranger to the parties in the cause after his decease, as evidence of a fact supposed to have been within the peculiar cognizance of such third person at the time, where by such act he charged himself with some burthen or debt, which gave another a right of action against him; or admitted a fact which went to destroy his own *prima facie* claim, and therefore had an interest against the declaration or admission of the fact. This it is which gives an authenticity to the evidence; for it is to be presumed that no man would charge himself with any debt or burthen, or discharge another from any apparent claim of his own, unless he had reasonable means of information to satisfy himself of the truth of it, and felt himself bound in duty and conscience to declare it. Upon this ground stewards' accounts, wherein they charge themselves with the receipt of money for their masters, have been admitted as evidence of such receipt on the account therein set forth. But in this case *Hobart*, the writer of the letter, does not charge himself at all; he had therefore no interest at stake either in acquiring accurate information of the fact, or in making the communication truly, as he would have had if his own interest had been involved in the consequences of it. All the cases where evidence of this sort has been admitted go upon this ground. In *Warren v. Grenville*,^(a) the principal ground of the decision was the presumption arising from length of time and possession, aided by the acknowledgment of the receipt of the money by the scrivener who prepared the surrender, annexed to his bill, whereby he did away his own claim for the amount. And in *Barry v. Bebbington*, 4 Term Rep. 514, and *Stead v. Heaton*,^(b) accounts delivered were admitted as evidence of the right in which the sums were received, wherewith the parties making such accounts charged themselves to their respective employers. On the other hand, evidence of this sort has always been rejected where the third person making the account or entry did not charge himself or discharge another; as in *Outram v. Morewood*, 5 Term Rep. 121, and *Calvert v. Archbishop of Canterbury*, 2 Esp. N. P. Cas. 646. The true ground on which counterparts of old leases (for it is the counterparts and not the leases themselves which are properly evidence for the owner) are evidence of title and possession is the same; the tenant executing such counterpart thereby binds himself for the payment of rent and performance of covenants to his landlord, which it must be presumed he would not do without having first satisfied himself of the fact at least of his landlord's possession of the premises, and his ability to put him in possession; and this is an acknowledgment by the tenant of his landlord's title, and goes in derogation of the title of the tenant himself, which his possession would *prima facie* import. It is material to observe also, that in all these cases the accounts, entries, or leases, whereby the parties making them respectively charge themselves, are not made for themselves, to be produced or withheld as may best suit their own purposes afterwards, but derive their authenticity and force from the consideration that they are documents delivered into the hands of those who have an adverse interest to enforce against them, of which the documents themselves furnish evidence against the framers. The same objections apply with at least equal force against the admissibility in evidence of the entries made by the former tenant for life of the receipt of rent for these premises from the then lessee: they were merely private memorandums of his own, not meant to be put into the hands of his lessee, who might avail himself of his admission that the rent had been paid: and he might have suppressed them at his pleasure. And the case of *Outram v. Morewood* is directly in point against the admissibility of such entries to prove any right in the owner who made

(a) 2 Stra. 1129, and S. C. in *Goodtitle v. The Duke of Chandos*, 2 Burr. 1022. 5.

(b) 4 Term Rep. 669, and vide also *Harpur v. Brook*, T. 14 Geo. 3; 3 Wooddes. 332, and 2 Bac. Abr. 637.

them. If it be said, that this was evidence against himself to limit his own power of leasing, it is to be observed that at the time of the entries made the premises had been leased out, and whatever interest the tenant for life might have had before any lease granted to lower the rent in order to increase the fine, yet after the fine paid and the lease granted, his interest would be the other way. After all, the most which it can amount to is an admission by *E. Prideaux* the younger, the former tenant for life, that the rent of these premises at that time was 14*l.* a-year : but his admission is no evidence against the defendant who claims from *Humphrey*, a subsequent tenant for life, who claimed as a purchaser ; there being no privity of estate between them. And the question is, what was the *ancient rent* at the time of the power created, by which must be understood the *ancient conventional* rent ; and that cannot be proved by shewing what was the *rack* rent reserved under a lease then recently granted in the time of *E. P.* the younger, the second taker for life.

The Solicitor-General, Lens, Serjt., and Dampier, in support of the rule, (after a short attempt, which was afterwards abandoned, to maintain that the *onus probandi* lay on the defendant to shew that the rent reserved was the *ancient* rent, in order to shew that it was a lease within the power) relied principally on this, that the letter of *Hobart* purporting to be that of a steward, (which was sufficient for the purpose,) adopted and recognized as it was by the indorsement of *Edmund Prideaux* the younger then tenant for life, and placed amongst the muniments of his estate, and his entries in his book of the receipt of rent for the tenement in question, both which were preserved by *Humphrey*, the succeeding tenant for life, amongst the muniments of the estate, amounted to an acknowledgment by the former tenant for life against his own interest, that the *ancient rent* was 14*l.* a-year ; every tenant for life being interested to reduce the rent as low as possible, in order that he might get a larger fine for renewal. That this was not a declaration by a mere stranger to the estate, but by one who stood in the same relation to it as the party from whom the defendant claimed, and had the same interest against the acknowledgment made by him : and he had acted upon it by the receipt of rent in conformity with the rental given to him. That this differed from *Outram v. Morewood*, where the acts of a mere stranger to the estate of the parties in the cause were offered in evidence : whereas this was a question which equally affected the interests of all the tenants for life : it did not fall therefore within the objection of *res inter alios acta*. That counterparts of leases were but the acts of parties connected with the same estate, which were evidence against third persons.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court to this effect.

As to the admissibility in evidence of the paper subscribed by *Hobart*, which was found by the attorney for the lessor of the plaintiff amongst the muniments of the estate, and which appeared by the contents of it to have been written by a person having an intimate knowledge of the property, who was in the confidential employment of the person to whom written, and relative to all his estates in *Cornwall* of which that of *Trevelthan*, put down as at a rent of 14*l.* per annum, was one, and which paper appeared to have been continued by the successive owners of the estate amongst their muniments ; it is to be observed, that the person to whom it was addressed, and by whom it was so preserved, was one who was only tenant for life, with a leasing power for 21 years or three lives, upon condition (*inter alia*) of reserving the *ancient rent* : and the question is, whether as against him or any other who was under the restrictions of the same power, this paper was not evidence of the amount of the *ancient rent* ? The contents of the paper were adverse to the title of the person who had possession of it ; it diminished his interest in the fine on renewal, in the same proportion as it raised the rent to be reserved. The

paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time, but certainly, as the contents shew, by one who had an intimate knowledge of it : and it was in some degree recognized as authentic by the then owner of the estate, the tenant for life, by this indorsement written upon it :—" From *Hobart, a particular of my estate in Cornwall*;" thereby importing, that the writer bore the degree of relation to the estates and their owner, which he purports to do on the face of the paper, and that the owner considered the paper as an actual particular of his estates. The question then is, whether this declaration of the then tenant for life so circumstanced, (for it is to be considered only as a declaration by him,) as to the existing rent of the tenement in question, be evidence of that fact against a succeeding tenant for life of the estate having a similar limited power of leasing, reserving the ancient rent, who claimed as a purchaser; for if he had derived title from the former tenant for life by whom the indorsement was made, the case would have been quite clear. And we think it is also evidence against the defendant who claims from a succeeding tenant for life. It appears that the former tenant for life, by whom the paper was thus accredited, was not only disinterested in respect of the particular fact of the then existing rent, but that he had an interest the other way, to diminish the amount of it. Then at this distance of time, with the means of knowledge which he had of the fact, and his interest in declaring it the other way, we think that his declaration is evidence of the fact to go to the jury.⁽¹⁾ There are several instances in the books where the declaration of a person having knowledge of a fact, and no interest to falsify it, has been admitted as evidence of it after his death. Thus, the written memorandum of a father as to the time when his child was born has been received to prove when the infant would come of age, and that he was in fact under age at the time of making his will, *Herbert v. Tuckal*, T. Ray. 84. And yet the most that can be said for such evidence is the peculiar means of knowledge of the fact by the father, and the absence of all interest in him at the time of the memorandum or declaration made to falsify the truth in respect to it. So an entry of the receipt of ecclesiastical dues in the books of a deceased rector is evidence for his successor, Anon. Buno. 46. 180, and 2 Ves. 43; which must also be upon the same ground of an absence of all interest to mis-state the fact in the rector making such entry, which could not possibly be evidence for himself. Now, this paper might, if it had ever met the eye, have been used adversely to the former tenant for life by whom it was authenticated, and could not have been evidence in his favour: he could not therefore have had any undue motive for preserving it. In like manner ancient deeds^(a) proved to have been found amongst deeds and evidences of land may be given in evidence, although the execution of them cannot be proved: and the reason given is, "that it is hard to prove ancient things, and the finding them in such a place is a presumption they were fairly and honestly obtained, and reserved for use, and are free from suspicion of dishonesty." The paper, therefore, having been found amongst the muniments of the family, accredited by one who could not have used it in his own favour, and preserved by him and by the succeeding tenant for life, against whom it might have been used adversely; we think that it was evidence to be left to the jury of the amount of the ancient rent at the time it bears date. And upon the same grounds we think that the entries in the book of the receipt of rent made by the same person were also evidence of the fact, which ought to have been submitted to the jury.

Rule absolute.⁽²⁾

(1) Vide *Hegham & ux. v. Ridgway*, 10 East, 109.

(a) Vide 12 Vin. Abr. 84, tit. Evidence, (A), (B), 5; Ancient Deeds, pl. 7, cites Tri. per Pais. 220; 24 Car. B. R.

(2) ["It is an established principle of evidence, that if a party who has peculiar know-

The King v. The Commissioners of the Court of Requests in the City of London.

7 East, 292. Feb. 11, 1806.

It seems that a *stock-broker* is liable to pay to the chamberlain of *London*, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 Ann. c. 16. s. 4, to be received by the chamberlain from every *broker*. But at all events, if the chamberlain sue for such duty in the *London* Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts, and that the judges of the Court of Requests were freemen of the corporation interested in the suit, this Court will grant a *mandamus* to the commissioners to proceed therein; for under the statute of Ann. their chamberlain is a *trustee* for the corporation, and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their chamberlain by the legislature: neither is the right of the chamberlain to sue in the Court of Requests, which has always been the practice, affected by the *scintilla* of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest.

THIS was a rule upon these commissioners to shew cause why a *mandamus* should not issue commanding them to hear and determine a suit instituted in their Court of Requests by the Chamberlain of *London* against *F. Baily*. The object of that suit was to recover for the use of the corporation of *London* the sum of 40*s.*, the annual duty upon the defendant *Baily* as a broker, which is directed by the stat. 6 Ann. c. 16. s. 4, to be paid to the Chamberlain for the use of the corporation, and which duty *Baily* had paid for several years before, but had refused to pay for the last year, upon the ground that being a *stockbroker* he was not within the meaning of the act. Upon the suit being instituted by the Chamberlain before the Court of Requests, which by the stat. 39 & 40 Geo. 3. c. 104, has summary jurisdiction over causes not exceeding 5*l.* *Baily* objected to the jurisdiction of the Court: contending that he had made no contract with the Chamberlain; but that the duty, if payable at all, was payable to the mayor and aldermen, &c. in their corporate capacity, to whom he had given bond in the penal sum of 10*l.* conditioned for the payment of the annual duty of 40*s.*: that therefore the simple contract, if any, was merged in the specialty; and that the specialty debt, amounting to 10*l.*, could not be sued for in the Court of Requests. And further, that the judges of that Court, being freemen of the city of *London*, were interested in the suit; the money when recovered being for the use of the corporation: and in that respect also, that that Court was incompetent to try the cause. The commissioners thought the objection to their jurisdiction well founded, and refused to make any order or judgment in the cause. The present rule was obtained on the grounds, that whatever might be the construction of the act of Queen *Anne* as to *brokers* (which had been often ruled in the superior Courts to include *stock brokers*) it could be no objection to the *jurisdiction* of the Court of Requests to take cognizance of the chamberlain's claim, that another species of collateral security was given to other persons for the same sum. Nor did the objection of interest in the commissioners arise; for by the acts of parliament constituting the Court of Requests, it is to consist of (besides two aldermen) twenty inhabitants householders of the respective wards, including the common councilmen for the time being, who act for one calendar month in rotation of wards, any three of whom may hear and decide

ledge of the fact, by his written entry or even declaration concerning it, charges himself or discharges another upon whom he would otherwise have a claim, such entry is admissible evidence of the fact, after the death of the party." 1 Stark. Evid. 355. See *Short v. Lee*, 2 J. & W. 489. *Gleadow v. Atkin*, 1 C. & M. 424.—W.]

causes where the debt shall not exceed 40s.: and in default of a sufficient number attending out of the ward in rotation, the assistance of other commissioners may be called in from the other wards: and out of the whole number there could be no doubt that three disinterested persons might be found to whom the *mandamus* might be directed. But it was also contended to be no objection though all the attending commissioners were freemen, having no individual interest in the event of the suit; and it not being a Court belonging to the corporation of the city, but an independent jurisdiction constituted by act of parliament: though if it had been a corporate Court, yet from *Wagoner's case*(a) down to the present time the chamberlain has always sued for penalties for the benefit of the corporation upon their own by-laws in their own Courts.

The Solicitor-General, The Common Serjeant, and Dampier were heard against the rule for the *mandamus*, and relied upon the objections above mentioned.

Wilson, in support of the rule, answered them as before; and urged further, that by the statute of Anne the chamberlain was made a trustee for *Wm. Stewart*, the then lessee of the corporation, and afterwards for the corporation itself: and that if the question had arisen recently after the act, before *Stewart* was compensated, it could not have been objected that the corporation must have sued. That if the chamberlain had been only an agent or servant of the corporation, and not a trustee, it would be in their power to change him and appoint another to receive the dues; which they could not do by the express provision of the act. [Lord *Ellenborough*, C. J. It seems that the chamberlain must be considered as a trustee for the corporation under the act of parliament: for it directs that, after *Stewart* shall be satisfied the sum due to him out of the money received by the Chamberlain, "all the monies, &c. shall go to and be enjoyed by the corporation." Now if the chamberlain had been no more than a mere agent or servant of the corporation, the money would have gone to them of course. *The Solicitor-General*, to whom this was addressed, then relied upon there being a specific remedy on the bond, and therefore no occasion to apply for the extraordinary interference of this Court. To which it was answered.] That there was no other method by which the chamberlain could have the benefit of the Court of Requests, which the legislature meant to give him for the recovery of small debts: and if he were driven to sue in the superior Courts for 40s. from each broker, the remedy would be too expensive to be enforced.

LORD ELLENBOROUGH, C. J. The right of the Chamberlain to sue in the Court of Requests having been already disposed of, the only question is, whether he shall be excluded from the *mandamus* because of the remedy of the corporation on the broker's bond? But it appears to me, that it would be going too far to oust them of their ordinary remedy and benefit which the legislature intended for them of suing in the name of the chamberlain in their own Court, because they have taken the collateral security of a bond to themselves. And if there be any difficulty in directing the *mandamus* generally to the commissioners, on account of the interest of some of them as members of the corporation, we may direct it to certain of them, as judges of the Court, who are not interested in the receipt of the money.

Wilson, however, suggesting that it could not make a difference to any individual commissioner, Lord *Ellenborough* said, that in that case the *mandamus* might as well go generally.

Per Curiam,

Rule absolute.

(a) 8 Rep. 121, b. there called *The Case of the City of London*.

Lord Kinnaird and Others v. Lyall.

7 East, 296. Feb. 11, 1806.

Though a writ of error abate by the death of the plaintiff in error before it be returned and certified, yet execution cannot afterwards be issued on the judgment without leave of the Court; and the Court refused leave for the plaintiff here to issue a *testatum f. fa.* tested in the last term on the return day of the original *f. fa.* which was after the allowance and service of the writ of error.

LITTLEDALE, on a former day, obtained a rule *nisi* for setting aside the execution issued in this cause for irregularity. The action was brought in *Michaelmas* term 1804, and judgment recovered in *Hilary* 1805. In the same term, a writ of error was brought in the Exchequer-chamber, and on the 13th of *November* 1805, in *Michaelmas* term, judgment was affirmed for 2185*l.*; and on the 16th, a writ of error to parliament was allowed, which was served on the 18th; but before it was returned and certified, viz. on the 9th of *December* following, the plaintiff in error died. On the 14th of *January* 1806, a writ of *testatum fieri facias* issued, tested the 21st of *November* preceding, and returnable the first day of *Hilary* term 1806: the original writ of *fieri facias* having been tested the first day of *Michaelmas* term 1805, returnable the 21st of *November*. The irregularity complained of was, that the execution issued after the allowance of the writ of error, and after the death of the plaintiff in error. And he contended that the writ of error allowed, though it abated by the death of the plaintiff in error, was sufficient to prevent the issuing of the writ of execution without the leave of the Court: and that the objection was not gotten rid of by the antedating of the writ of *testatum fieri facias* to a period before the death of the party; for it would still appear to be after the allowance of and pending of the writ of error. And he cited *Penoyer v. Brace*, 1 *Ld. Ray.* 244. *Carth.* 404, and 1 *Salk.* 319, as in point, and also referred to *Cramborne v. Quennel*, 4to Barnes, 201; *Olorenshaw v. Stansforth*, 4to Barnes, 201, and *Hayes v. Thornton*, 4to Barnes, 201, to shew that the abatement of the writ of error by death made no difference.

The *Solicitor-General* and *W. E. Taunton*, in shewing cause, observed that according to the report of *Penoyer v. Brace*, in *Salkeld*, the record was certified, which, if accurate, would distinguish it from this case. But

The Court were clearly of opinion that after the writ of error allowed, though afterwards abated by the death of the plaintiff in error, the defendant in error could not take out execution without the leave of the Court: and therefore they made the

Rule absolute.

A rule *nisi* was then obtained to permit the plaintiffs to sue out a writ of execution tested as of last term; against which

Littledale now shewed cause, and referred to the opinion of Lord *Holt* in *Penoyer v. Brace*, that a *scire facias* could only be dispensed with where there was not any alteration of the record, nor any new person made liable to the execution: and here the executor of the plaintiff in error is a new party. And, in answer to a suggestion by the Court, that if a party against whom judgment of the term might be entered up died in vacation, there was no need of a *scire facias* against his executor; (a) he answered, that the vacation was an emanation of the prior term; but here was a new term intervening; and if this could be done now, by the same reason it might be done after two or three terms. And in *Heapy v. Paris*, 6 *Term Rep.* 363, though a judgment on a warrant of attorney entered in *Easter* vacation was holden good against a defendant who died in *Easter* term; yet the Court held, that execution could

(a) Vide *Bragner v. Langmead*, 7 *Term Rep.* 20.

not be sued out upon it till it were revived by *scire facias* against his representative.

W. E. Taunton, in support of the rule, said, that the justice of the case was with the plaintiffs, and no incongruity would appear upon the record; for that the writ of error in parliament having abated before the return of it, there need be no entry of it on the record; but

The Court said, that was not so; for a minute was entered in the margin of the judgment roll, "error allowed;" and when the entry came to be regularly made out on the record the incongruity would appear. For there must be a suggestion entered on the record to notify the abatement of the writ of error by the death of the plaintiff in error; and that suggestion would state, that on such a day, such an one comes by his attorney and gives the Court to be informed, that on a certain day the plaintiff in error died: after which it would appear that the Court awarded a writ of execution tested before the death of the party, while the writ of error was pending. And no doubt if it were any advantage to the defendant here, that the true day of the award of execution should appear upon the roll, he may come and pray the Court to have it regularly entered. The only ground on which, if a party die in vacation, execution may issue as of the preceding term, is, because no incongruity then appears on the record: but here if the proceeding prayed for were truly entered, it would be error on the record.

Rule discharged.

Doe, on the Demise of Mark Cook and Elizabeth his Wife, v. Danvers.

7 East, 299. Feb. 12, 1806.

The *freehold* of an estate, parcel of a manor, and demisable only by the licence of the lord, passing by surrender and admittance to which the tenant was admitted by the description of a customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs and other services, is in the *lord* and not in the *tenant*, though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of *copyhold* in a will; the intention to pass it under that description being apparent.

Such customary estate is not within the 5th section of the statute of frauds, 29 Car. 2. c. 3, so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section, as a declaration of trust, requiring to be proved by a writing *signed by the party*; which applies only to cases where the legal and equitable estates are separated; or by a *will in writing*, which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party, though without any signature or attestation, which was established as her will by the ecclesiastical court granting probate thereof, and is a good will under the statute of wills; the estate having been surrendered to the use of her last will in writing. Such estates pass, not by the will alone, but by the will and surrender taken together. And the entry of the devisee, after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry, as in the case of a devisee: nor to copyhold or customary estates where the freehold is in the lord. Nor was such entry barred by the statute of limitations 21 J. 1. c. 16, having been made within 20 years after the old lease expired; the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent.

A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good, if the jury find from the circumstances that she was the person meant to be designated.

THIS was an ejectment to recover the possession of a house and premises,

situate in the parish of *St. Dunstan's, Stebunheath*, otherwise *Stepney*, in the county of *Middlesex*. The declaration was intituled of *Hilary* term 44 Geo. 3, and was upon two demises by *Mark Cook* and *Elizabeth* his wife, in right of his said wife; the first being laid upon the 1st of *July* 1800, and the second upon the 1st of *January* 1802. And at the trial before Lord *Ellenborough* C. J. the following facts were admitted, and a verdict was found for the plaintiff, subject to the opinion of the Court upon the following case.

The premises in question are parcel of the manor of *Stebunheath*, otherwise *Stepney*, in *Middlesex*. At a Court holden for the manor on the 12th of *April* 1743, *Thomazine Taylor*, spinster, was admitted to the premises, by the description of "all that customary messuage or tenement, with the appurtenances, on the south side of *Radcliffe Broad-street*, late in the occupation of — *Chandler*, butcher; to have and to hold the said premises, with the appurtenances, unto the said *Thomazine Taylor*, her heirs and assigns for ever, of the lord of the said manor, by the rod, according to the custom of the said manor by the rent, suit of court, customs, and other services thereof, heretofore due and of right accustomed. And she gave to the lord for a fine for such her estate and entry in the premises 1*l.* 5*s.*, and fealty was respited, and so, saving always the right of the lord, the said *T. Taylor* was admitted tenant thereof in form aforesaid." At the same court *T. Taylor*, according to the custom of the manor, surrendered (amongst others) the premises in question into the hands of the lord of the manor by the description of "all and singular her customary messuages, tenements, cottages, lands, and other hereditaments whatsoever, holden of the lord of the said manor by copy of court-roll, with their and every of their appurtenances, to such uses, intents, and purposes as the said *T. Taylor* in or by her last will and testament in writing should limit, appoint or declare." The court-books of the manor of *Stepney* now in existence commence in the year 1654, and contain entries of admissions of all the tenants admitted to the premises in question between that period and the 3d of *May* 1791, which are all in the same form. The *habendum* of these entries are also in the same form as that already set forth in the admissions of *Thomazine Taylor*; and the admissions are severally followed by entries of surrender by the new tenants to the same uses, and in the same form, as is already to set forth in that entry. Other tenements in the manor appear to have passed by grants similar to the foregoing from the commencement of the court-rolls. *T. Taylor*, by indenture "of lease of the 7th of *June* 1759, by virtue of a previous licence from the lord, demised the premises in question to *Dorothy Whiting*, since deceased, for 41 years from *Midsummer-day* then next, at the rent of 8*l.* per ann., payable quarterly on the usual rent-days, and subject to the following proviso for re-entry in case of non-payment; Provided always, that if the said yearly rent of 8*l.* shall be unpaid for 21 days, &c. or if all defects of reparations from time to time, &c. be not amended within three months next after notice in writing, &c.; or if the said *D. Whiting*, her executors, &c. do not well and truly keep all and every the covenants, &c. on her and their parts, &c.; that then and from thenceforth, and at all times afterwards, it shall and may be lawful for the said *T. Taylor*, her heirs, &c. into and upon the demised premises, &c. to re-enter and re-possess," &c. The lessee took possession of the premises under this lease, and she and her representative, Mr. *John Scott Whiting*, (the present tenant in possession) continued to occupy them from the commencement of the lease until the expiration of it at *Midsummer* 1800. On the 3d of *August* 1780, Miss *Taylor*, the lessor, gave directions to her attorney to prepare her will; and he accordingly wrote down the following instructions for it, and was desired to attend her therewith the following morning at 11 o'clock to have it executed. "*Thomazine Taylor*, of the parish of *St. Mary, Rother*, com. *Surrey*, spinster, by her will gives to *John Noble*, the father, in trust for *Richard Noble*, and *Thomazine Noble*, all that messe or tene-

"ment situate on *Fish-street-Hill, London*, to in trust for his two children, and until their ages of 21 years: all that copyhold messuage or tenement situate in *Radcliffe-Highway*, within the manor of *Stepney*, to *Mary Cook*, wife of ——— *Cook*, and to her heirs for ever; no surrender to use of will ever made; all the residue to *John Noble* absolutely; to be buried in the vault under *Lincoln* church, where my uncle and aunt *Merwin* lie; and appoints said *John Noble* sole executor; to Mr. *Francis Mason* my best diamond ring of the value of 50*l.*" Before any will was formally prepared by the attorney under these instructions, viz. upon the said 3d of *August* 1780, Miss *Taylor* died, leaving *Thomas Danvers*, father to the present defendant, her heir at law. These instructions were, upon the 25th of *February* 1782, pronounced for and established as the only will of Miss *Taylor* by the prerogative court, and probate thereof was afterwards granted accordingly. Upon the 21st of *June* 1782, *Thomas Danvers* was admitted to the premises in question, as heir at law of *T. Taylor*, in the accustomed form above set forth. The rent was paid to *Thomas Danvers* from the time of Miss *Taylor's* death until his own death in *January* 1791, and from that time until the expiration of the lease to his son *James Danvers*, the defendant, who, upon his father's death, was admitted 3d *May* 1791 to the estate as his heir at law, in the same form as his father was admitted; and, upon the expiration of the lease, made a new devise to Mrs. *Whiting*, under which the latter held, and paid rent as tenant to the defendant, at the time of the demises laid in the declaration. The lessor of the plaintiff *Elizabeth* was admitted to the premises upon the 1st of *December* 1801, to hold to her and her heirs of the lord, according to the form of the entry before set forth. Her marriage with the other lessor was proved at the trial: and it was also proved that the testatrix had no other relative of the name of *Cook*, except the lessor of the plaintiff, *Elizabeth*, and that she was the person who was intended to take by the name of *Mary Cook*, as described in the instructions of the 3d of *August* 1780. The question for the opinion of the Court was, Whether the lessors of the plaintiff were, under the above circumstances, entitled to recover?

This case was argued in *Trinity* term last, by *Lawes* for the plaintiff, and *Nolan* for the defendant, and again in *Michaelmas* term last, by *Gibbs*, *Solicitor-General*, for the plaintiff, and *Marryat* for the defendant. The arguments ran to great length, and for brevity's sake, I shall reverse the order in which they were delivered.

The lessor of the plaintiff *Elizabeth Cook*, whom the jury found to be the person intended by the description of *Mary Cook*, in the paper of instructions for a will prepared by the attorney of *Thomazine Taylor*, and not signed by her or attested, but which was pronounced to be her will by the prerogative court, claimed the premises in question under such will by the description of *copyhold*; to which premises *Thomazine* had been before admitted by the description of all that *customary* tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the rent, suit of court, customs, and other services, &c., and had before surrendered, by the description of *customary* lands, &c. holden by copy of court roll, to such uses as she by her last will and testament in writing should appoint. But though the testatrix died in *August* 1780, and the will was established in *February* 1782, yet owing to an outstanding lease granted by the testatrix in her lifetime, which did not expire till *June* 1800, the devisee did not enter or bring ejectment till *Hilary* term 1802, but suffered the heir at law of the testatrix, who was admitted to the premises in 1782, and afterwards the defendant his son, to whom they descended in 1791, to take the rent during the intermediate time; and this although there was a proviso in the lease for re-entry in case of non-payment of rent.

Upon these facts the defendant's counsel took four objections to the title of the lessor of the plaintiff *Elizabeth* (the devisee) to recover in this action.

1st, That the premises in question were not *copyhold*, but *customary freehold*, and as such were within the fifth clause of the stat. of frauds 29 Car. 2. c. 3, and could only pass by a will in writing signed, &c. and attested by three witnesses. Or if not within that branch; then 2dly, that they were within the seventh or ninth section and could only pass by a will in writing, signed by the party, as a declaration or assignment of a trust. But if they were well passed by the will; then 3dly, that the lessor's right of entry was either tolled by the descent cast on the defendant; or 4thly, that it was barred by the statute of limitations, 21 Jac. 1. c. 16; and that either, 1st, by the non-receipt of rent under the lease granted by the testatrix for more than 20 years since her death; and the defendant and his father having during all that time had an adverse enjoyment of such rent and of the premises: or, 2dly, by the lessor Elizabeth not having availed herself for more than 20 years of her right of entry under the proviso in the lease for non-payment of rent, or otherwise.

First, the estate not being holden *ad voluntatem domini*, though by copy of court roll, is not *copyhold*, properly so called, but *customary freehold*, the freehold of which is in the tenant, and not in the lord, who is only an instrument to convey it; inasmuch that in pleading, title would be deduced not from the lord but from the person last seised. *Britton*, C. 66. p. 165, considers customary tenants as socmen, and not villein socmen, as *Bracton*, L. 1. c. 11. §. 4. tr. 1. c. 28. s. 5, does; and *Blackstone*, (a) who was at the bar when he wrote his Treatise of Copyholds, though he adopts *Bracton's* opinion, yet admits that these tenants are called in some books *freeholders* generally, and in all others *customary freeholders*, and that they have a *freehold interest*, though he denies that they have a *freehold tenure*, both of which he contends to be necessary for a right of voting for a county: and in Fitzh. N. B. 11 M. and 12 B. they are considered as tenants in ancient demesne. But whether villein socmen, or pure socmen, must depend upon the nature of their services, all of which are certain and free in this case. All the authorities are collected in *Roe d. Conolly v. Vernon*, (b) particularly *Hughes v. Harrys*, Cro. Car. 229; *Gale v. Noble*, Carth. 33; *Crouther v. Oldfield*, Salk. 364. 2 Ld. Raym. 1225, and 1. Lutw. 125; Anon. 11 Mod. 33, and *Rogers v. Bradley*, 2 Ventr. 143, which established the distinction between copyhold and these customary estates, which are considered to be freehold. Then the testatrix having named the premises as *copyhold* in her will cannot alter the tenure: though it may raise a question how far a *freehold* interest can pass under such a description, and where the estate was not surrendered to the use of the will. Though lands have sometimes passed with a mis-description annexed; yet in all those cases there have been general words sufficient to carry the estate; and it has only been considered that the addition of a misdescription should not hurt the operation of the general words. [Lord Ellenborough, C. J. We must take it upon this case that the testatrix meant her customary land, having no other description of land in the manor.] If then the freehold be in the tenant and not in the lord, as in case of copyhold, the will ought to have been attested by three witnesses, and executed according to the fifth section of the statute of frauds, 29 Car. 2. c. 3, which directs that "all devises of any lands, &c. devisable either by force of the statute of wills, or of that statute, or by force of any particular custom, &c. shall be in writing, and signed by the party, &c. and shall be attested, &c. by three witnesses, &c. or else be void." Now, by the first statute of wills, 32 H. 8. c. 1, explained by st. 34 & 35 H. 8. c. 5, power was given to dispose of all lands "of the nature of soccage tenure;" and the second or explanatory statute was not meant to restrain the nature of the property capable of being devised, but merely the power of those to devise it, who had not the whole interest in the

(a) Considerations on Copyholds, p. 96, and 111, of his tracts.

(b) 5 East, 51, and vide *Doe v. Huntington*, 4 East, 271.

subject matter, such as tenants for life or in tail, &c. In *Tufnell v. Page*, 2 Atk. 37, and Barnard. Ch. Rep. 9, copyholds were indeed holden not to be within the statute of frauds; and though it may now be too late to controvert that construction, yet it has been often since disapproved of, and it has been said, that it ought not to be carried further. (a) And in *Hussey v. Grills*, Amb. 301, Lord *Hardwicke* seemed to think that customary freeholds, being of a very different nature from copyholds, would not be governed by the same rule which took the others out of the statute. And it cannot be objected, that these estates pass by surrender, and not by will, and are therefore out of the statutes of wills; for the same objection would have applied to many wills good by custom before those statutes, and which are expressly within the fifth clause. [The Court, upon a doubt started, whether without a custom to surrender to the use of the will expressly found, they could infer such a custom, said, that upon the facts stated in the special case they would assume the existence of it; especially as their decision would not conclude the defendant, but he might bring another ejectment in case the judgment of the Court should be against him now.] Then secondly, supposing that the will, as such, need not be attested by three witnesses, within the fifth section, yet, as a declaration or assignment of a trust, it ought to have been signed by the party, as required by the seventh and ninth sections of the statute of frauds. The seventh section says, "that all declarations or creations of trust or confidence of any lands shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing; or else shall be void." The eighth section excepts trusts arising by implication of law. And the ninth section enacts, "that all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting, &c. or by such last will, or else shall likewise be void." These clauses are general, extending to all lands; and the first question will be, whether the trusts here spoken of are to be confined to cases where the legal is separated from the equitable estate, and where such trust or confidence is declared or created by the party having the legal estate, as will be contended on the other side? But if that were so, many cases would be taken out of the protection of the statute which are clearly within the mischief intended to be remedied, and which have always been considered to be included. A party may declare a trust of land who has no legal interest to pass, as in the case of one who has a contract for the purchase of land, or an agreement for a lease, &c. A fine also may be levied of an equitable estate; and unless the seventh clause attaches the uses of the fine might be declared by parol. [It was observed *contra*, that their argument was not confined to cases where the trust was declared by the same instrument which separated the legal from the equitable estate, but would extend to all cases where the legal and equitable estates were separated.] Here then, after the death of the surrenderor, the legal estate, which cannot be in abeyance, descended to her heir, and the will operated as a declaration of trust for the use of the person for whom the previous surrender had been made, and transferred the interest from the heir to the devisee. And it is no answer to say that the same objection would apply to the case of every common surrender; for that is expressly provided for and excepted out of the operation of the third clause of the statute; which says, "that no leases, estates, or interests, &c. (not being copyhold or customary interest) in any manors, lands, &c. shall be assigned, granted, or surrendered, unless by deed or note in writing signed by the party, &c. which shews that without such exception surrenders must have been signed by the party. So a term of years devised by such a will, (the legal interest of which vests in the executor until his assent to the devise, who it may be said is a

(a) By Lord *Macclesfield* in *Wagstaff v. Wagstaff*, 2 P. Wms. 259, and by Lord *Hardwicke* in *The Attorney-General v. Andrews*, 1 Ves. 225, and vide the opinions of *Buller*, J. and Lord *Loughborough*, C. in *Habergham v. Vincent*, 2 Ves. jun. 232, and 237.

trustee for the devisee,) is either not within the seventh clause, which has the words "lands, tenements, and hereditaments," meaning the realty in contradistinction to chattel interests, or is within the exception of the eighth section as a trust arising by implication of law. Then if the instrument be not sufficient as a declaration of trust in *writing* to pass the estate for want of its being signed, neither is it sufficient for that purpose as a *last will in writing* within the other branch of the same clause. By the words "*will in writing*" cannot be meant any such will as the ecclesiastical court would grant probate of, for that would include *nuncupative* wills, in direct contradiction to the plain intent of the statute, which requires the will to be in *writing*. The more obvious construction is to refer it to such will in writing as is before mentioned, namely a will in writing authenticated, if not by the attestation of three witnesses, at least by the signature of the party, as is required by the same clause to every other declaration of a trust in writing: and the legislature could not have meant that a declaration of a trust by will should be less authentic than by any other writing. The 9th section has the words "*such will*;" and the construction of that must be the same as of the seventh section. [Lord *Ellenborough*, C. J. and *Lawrence*, J. observed, that the seventh section had not the word *such* and that the 9th section, referring to *such will*, meant merely *such a will in writing* as is intended by the seventh section.] All the cases, except *Carey v. Askew*, 2 Bro. Ch. Cas. 59, seem to consider that a will of copyhold surrendered must not only be in writing, but signed by the party, within the statute. *Tuffnell v. Page*, 2 Barnard. Ch. Rep. 9, Vid. S. C. 2 Atk. 37, and *Roe v. Heyhoe*, 2 Blac. 1116. And so was the fact in the *Attorney-General v. Andrews*, 1 Ves. 225. The precise facts in *Carey v. Askew* do not distinctly appear; and upon searching the register's office, no decree is to be found either of the term mentioned in the report, or for some terms before and after that. And it seems strange that the probate of the ecclesiastical court should be considered conclusive to pass real property, with which the ordinary has no jurisdiction to meddle; thereby conferring a power upon another which he does not himself possess. That weakens the authority of the case, which was also shaken in *Harbergham v. Vincent*, 4 Bro. Ch. Cas. 553, 372, 384, where the instrument was signed by the party. The instrument in question is in truth no more than a nuncupative will, having neither signature nor witness to authenticate it as the act of the testatrix; and if it be good to pass copyhold or customary estate, property of that description is less guarded than personalty exceeding 30*l.* in value, the disposition of which by a nuncupative will has several checks imposed on it by the nineteenth section of the statute of frauds, none of which were observed in the present case. Thirdly, the lessors right of entry, if any once existed, was tolled by the descent cast on the defendant, *Thomas Danvers*, the defendant's father, and heir at law of the testatrix, was admitted into possession in 1782, and received the rent from her death in 1780 till his own death in 1791, when the estate descended to his son, the defendant. Now admitting, according to Co. Lit. 240, b. s. 392; and *Matheson v. Trott*, Owen, 141, and 1 Leon. 209, that the doctrine of descent cast does not apply to a devisee (though it is to be observed, that in the latter case, the Judges, who at first differed in opinion, afterward decided the case on a collateral ground), yet that distinction will not assist the plaintiff; if, as he contends, the estate pass by the surrender, and not by the will. Fourthly, at any rate, the lessor of the plaintiff is barred by the statute of limitations, 21 J. 1. c. 16, more than twenty years having elapsed since her right of entry accrued in 1780, on the death of *Thomazine Taylor*. 1st, Considering the estate as *copyhold*, the admittance is the investiture of the tenant, and no attornment is necessary, *Swinerton v. Miller*, Hob. 177, and Anon. 1 Leon. 290, 1; and a copyholder, having a right or title to admittance, which vests in him the whole seisin, is barred if he do not claim to be admitted within twenty years. Bro. Abr. Limitations, pl. 2, cites 6 Ed. 6, *Shaw v. Thompson*, Moor, 411, and *Roe*

v. *Hedder*, 3 Term Rep. 162, 171. Here, however, it is the stronger, because the defendant and his father, heirs at law of the testatrix, have had an adverse possession by admission and by the receipt of the rents and profits for above twenty years since the lessor's title accrued. For an heir is in by descent, and may bring ejectment before admittance, though a devisee or surrenderee cannot, *Roe v. Hicks*, 2 Wils. 15, 16. Co. Copyh. s. 39. Supplem. s. 4; and on admittance upon descent the heir is tenant immediately from the death of his ancestor, Co. Cop. 112 s. 41. 2dly, taking this to be *freehold*, the lessor of the plaintiff is also barred by his laches; and it is no answer to say, that the outstanding lease, which continued to run till *Midsummer* 1800, prevented his entry before; for it was still competent to him to have entered without committing a trespass; as to demand rent, or fealty, or to obtain seisin of the freehold. [*Lawrence, J.* Must not an entry to avoid the statute of limitations be an entry for the purpose of taking possession; (a) and how could the lessor have lawfully entered for that purpose during the continuance of the lease? If this were so, a right of entry might be preserved, even after an ouster of the rents and profits, for above 60 or 1000 years: which would entirely defeat the object of the statute, which was to quiet men's possession: and it would be incongruous to hold that an ejectment might be maintained after a real action was barred by length of time; and that such an effect should be produced by a tenancy from year to year, or even a tenancy at will. The tenant in possession, according to *Taylor v. Horde*, 1 Burr. 113, enjoys as the covenanted bailiff of the tenant of the freehold: and as a recovery of a term does not displace the freehold, so according to Co. Lit. s. 411, there may be a disseisin of the freehold, pending a term, which shall be no ouster of a term: but *Taylor v. Horde*, 1 Burr. 111, 113, shews that a mere entry on the land for another purpose does not operate as a disseisin of the tenant in possession, so as to make a good tenant to the *præcipe*. [Lord *Ellenborough, C. J.* Disseisin is said to be a personal trespass, a tortious ouster of the seisin of another. (b) And in Salk. 248, Lord *Holt* says that there can be no disseisin without an actual expulsion. (c) But can you shew that the devisee could have entered to vest the seisin in herself without committing a trespass upon the tenant in possession? because the law does not require a person to do that which would make him a wrong-doer. (d)] She might have had a writ of entry (e) during the continuance of the lease, for the purpose of asserting and establishing her right. Ouster of seisin is distinct from ouster of possession. Receipt of rent by a stranger is a disseisin; (f) and yet there is no ouster of possession. And at any rate, there might have been a symbolical delivery of customary lands in lease by admittance subject to the lease. Besides, the devisee might have brought a real action, wherein the judgment is *ut haberet seisinam*, &c. without saving any thing of the possession: and there the demandant counts upon his seisin, and not upon possession, as in ejectment. And if the

(a) In *Shepard's Epit.* (tit. Entry), a book which was much commended by the late Mr. Justice *Buller*, it is said of an entry into lands, that "It is most properly taken for the taking or having of possession of lands or tenements; but it is also used for a writ of possession," &c. "and he that hath a lawful power to enter is said to have a right or title of entry," &c. "and by this entry, if he have a right, he brings the possession and right together."

(b) Vide Co. Lit. 153, b.

(c) Vide Lord *Townsend v. Ash*, 3 Atk. 339. So *Sheph. Epit.* Disseisin. "Disseisin is where a man entereth into the lands or tenements of another, and putteth him out, where his entry is not lawful." This is intended of actual disseisin. For the doctrine of disseisin by Election, where a party, for the sake of certain remedies, is entitled to consider himself disseised, vide *Taylor v. Horde*, 1 Burr. 110, 111, &c.

(d) Vide Bro. Assize, pl. 163.

(e) For the several writs of entry, vide Co. Lit. 238, b. and Fitz. N. B. 442. 464. 473, 474, and 477, which are adapted to specific cases: but vide the stat. of Westm. 2. c. 24.

(f) i. e. At the election of the party, vide *Blunden v. Bough*, Cro. Car. 893, and Lit. s. 668, 669.

fact of the lands being in lease do not bar the seisin of the owner, there is no reason why it should bar his entry for the purpose of giving him seisin. The devisee might have justified in trespass brought by the tenant, that she entered in order to vest the seisin in herself, or to assert her right, whatever it might be, against the party claiming and taking the rent, and not to oust the tenant. She might also have entered to distrain for the rent. And at all events, as there was a clause in the lease for re-entry in default of payment of the rent, the devisee might have availed herself of the forfeiture to enter and keep possession above 20 years ago. The statute of limitations has always been construed favourably with a view to quiet possessions. (a) And the question, whether receipt of rent by one tenant in common for above 20 years were an ouster of his companion, *Doe v. Prosser*, Cowp. 217, could never have occurred, if an adverse receipt of rent for such a length of time had not been considered as a bar. Now here the defendant, and his father before him, have had an adverse possession by receipt of the rent for above 20 years, which is not only a bar to the lessor's remedy by ejectment, but gives the defendant a title to the possession, from whence he can only be removed by a real action: and this distinguishes the case from *Doe d. Orrell v. Madox*, *Runnington's Ejectment*, 458, where the only question was, whether it were necessary for the lessor of the plaintiff to shew a receipt of rent within 20 years on an outstanding lease; which was holden not to be necessary.

Arguments for the plaintiff.

First, Whether this be customary freehold, as some say, or privileged copyhold, as others think, *Blackstone*, who in his treatise on Copyholders collects all the learning and authorities upon the subject, arrives at the conclusion that the freehold is in the lord, and not in the tenant: and this is supported by the subsequent cases. Estates of this description vary in nothing from strict copyholds, except that they are not stated to be holden at the will of the lord. But as the tenant cannot lease without a licence, there must be some interest remaining in the lord, and that interest must be freehold. Here too this estate is found to be parcel of the manor, and not to be holden of the manor; the legal inference from which is, that it is copyhold, according to *Brittel v. Bade*, 1 Ld. Ray. 43; and this is supported by *Crouther v. Oldfield*, Salk. 364; though the first resolution there takes a distinction, as some other cases mentioned have done, between copyhold and customary estates, which has been since overruled: for in *Stephenson v. Hill*, 2 Burr. 1278, it was expressly decided, that the freehold of such customary estates is in the lord: and in *Doe v. Huntington*, 4 East, 268, and *Roe v. Vernon*, 5 East, 51—75, it was considered that they partook of the nature of copyhold. Then being holden by copy, the estate was sufficiently described as copyhold in the will, and at any rate was plainly intended to pass by that description. If then it be copyhold, or of the nature of copyhold, it is clearly not within the 5th section of the statute of frauds, requiring all devises of land, devisable by the statute of wills, or by that statute to be in writing, and signed, &c., and to be attested by three witnesses. For property of this description does not pass by the will alone, but by the surrender, the uses of which are directed by the will. This is decided by all the cases from *The Attorney-General v. Barnes*, 2 Vern. 598; *Attorney-General v. Andrews*, 1 Ves. 225; *Wagstaff v. Wagstaff*, 2 P. Wms. 268; *Tuffnell v. Page*, 2 Atk. 37; to *Carey v. Askew*, 2 Bro. Ch. Cas. 58. The opinion of Lord Hardwicke, C. in *Tuffnell v. Page* is express, that the 5th clause of the statute of frauds is confined to such estates as pass by the statute of wills 84 & 35 H. 6. c. 5, explaining the prior statute of 32 H. 8. c. 1, and confining the term estates of inheritance, there mentioned, to estates of fee simple, and therefore does not include customary estates; which he said had been settled ever since *The Attorney-General v. Barnes*. And this is

(a) *Doe v. Jones*, 4 Term Rep. 300; *Doe v. Shane*, M. 28 Geo. 3; *Ib.* 206, n. And *Doe v. Jesson*, 5 East, 80.

not overruled, as supposed, by what is said in *Hussey v. Grills*, Ambl. 209, which is not very clearly reported; for it should rather seem that the codicil, and not the will, was not attested according to the statute of frauds; the question stated being, whether the codicil were a good revocation of the will. At any rate, it is distinguishable from the present case, inasmuch as there was no custom there to surrender to the use of the will; and Lord *Hardwicke* said, that as there was no legal method of passing the legal estate in that way, there was no reason for holding it out of the statute: and that, as the legal estate was not within the statute, so was not the trust; the surrenderer there having covenanted to surrender to such uses as the customary tenant should, by deed attested by two witnesses, or by will, appoint. Whereas here the estates have always been surrendered to the use of wills. Secondly, The will was not necessary to be signed by the party, as a declaration of trust within the 7th section, nor consequently within the 9th section of the act. Those sections only apply to cases where the *legal* is separated from the *equitable* estate, whether by the instrument in question or by any other instrument declaring or assigning the trust. But this is a mode established by custom of passing the legal estate itself; and no trust or confidence is created or declared for another, apart from the legal estate; nor is the legal estate separated for an instant from the equitable estate, but both pass by the surrender and will together. The legal estate continues in the surrenderor, notwithstanding the surrender, and would descend to his heir in case of his death until the admittance of the person designated by the surrender. If the will be a declaration of a trust or confidence within the 7th clause, so is every surrender to the use of another; but though surrenders be in writing, they never are signed by the parties; and to hold that to be necessary now for the first time would shake all the copyhold property in the kingdom. Suppose a surrender to the use of a will already made, the surrenderer would then declare the use as much as the will is said to do now; and if the one be a declaration of trust, it is difficult to say that the other must not be, so. [Lawrence, J. observed, that in the report of *Tuffnell v. Page* by *Barnardiston*, (a) Lord *Hardwicke* is made to say, that "when the will is in writing and signed by the party, that is sufficient," &c.] That is not stated in the report of the case by *Atkins*; and taking the whole sentence together in *Barnardiston*, it seems a strange mode of expressing an opinion that a will of copyhold ought to be signed by the party. For in stating what is necessary, he only says that it must be in writing; though, he adds, that when it is in writing, &c. Lord *Hardwicke* had before stated that it need not be attested; and when he was pointing out what was necessary, and says that it must be in writing, it is strange that he should not then have added, if such were his meaning, that it must be signed by the party. If, however, this be a case at all within the statute, the 7th clause has been complied with: for that only requires the trust to be declared by a will in writing, without the additional circumstance of being signed by the party, as required to any other sort of writing declaring a trust: and the difference of the expression makes it the stronger. And if writing meant a writing by the party, then his signature alone would not be sufficient. But a writing by the command of the party has been holden sufficient within the statute of wills; and signing has never been decided to be necessary in a will of copyhold, but the contrary has always been taken for granted. The words *will in writing* were used in contradistinction to nuncupative wills: and the objection, if valid, would extend equally to a will of leasehold. Indeed such a will, strictly considered, operates more as a declaration of trust than the present; for if a term be bequeathed, no legal interest passes to the legatee before the assent of the executor, but the whole interest

(a) Barnard. Ch. Rep. 9. The whole sentence is this, "So far indeed is necessary, that the will in such case must be in writing; but when it is in writing, and signed by the party, that is sufficient for such purpose."

vests in the executor; though if there be sufficient assets to pay debts, a court of equity will compel him to convey to the legatee: but it is clear that such a will need not be signed by the party. Again, suppose a term vested in A., who declares the trust of it to be for B., and then B. makes a will not signed, and bequeaths the trust of the term to another: that would be a case directly within the words of the 9th section, as construed by the defendant; yet it is clear that the term would pass by such a will. Then if a leasehold would pass, it is sufficient to pass copyhold. The statute of frauds leaves the case of copyhold, with respect to its passing by will, as it found it. Nuncupative wills are sufficiently guarded by the 19th section of the act: and as to them no instance occurs in the books of frauds attempted to be practised, though very many with respect to written wills; which shews that the checks put on the former by the legislature have been sufficient. And in regard to copyhold there is an additional check, that the will must be warranted by the surrender. In the second edition of Bro. Ch. Cas. it appears that the instructions for the will in *Carey v. Askew* were not signed by the party; and so it appears in the note of that case added by Mr. Cox to the report of *Wagstaff v. Wagstaff*, 3 P. Wms. 250. Signature is unknown to the law of England, except by positive statutes, and by the Law Merchant in case of bills of exchange: neither deed nor will need be signed at common law, though it might have been required by particular custom. Thirdly, As to the descent cast having tolled the entry of the lessor; that doctrine does not apply to cases where the party has no other right than that of entry, such as the case of a devisee, Co. Lit. 240, b.: nor to customary or copyhold estates where the freehold is in the lord, see Co. Lit. 249, a. But at any rate, a descent cast can only toll an entry where an entry might lawfully have been made; but the devisee had no right of entry pending the lease granted by the testatrix, which did not expire till 1800, and the law will never compel a person to be guilty of a trespass in order to acquire a right. Fourthly, The same answer applies to the objection that the entry of the lessor of the plaintiff was barred by the statute of limitations, 21 J. 1. c. 16. No other right or title of entry is within that statute, except that which is accompanied by a right of possession, which the lessor could not have pending the lease. And the payment of the rent during part of the time to the defendant and his father would not of itself make the holding of the tenant wrongful, but it still continued legal under the original term, as the lessor was not bound to take advantage of the forfeiture, and re-enter for the condition broken. Besides, the devisee, claiming under the will, was not bound to enter till the will was established, which was not till 1782, between which time and the bringing of the ejectment there was not an adverse possession of 20 years. They also referred to *Doe d. Orrell v. Madox*, Run. Eject. App. 458.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court.

In the several arguments of this case many points were agitated, and much ingenuity exercised upon questions about which the court has not entertained any doubt. As, 1st, Whether this estate in question be strictly copyhold, or customary freehold? 2d, Whether, if not strictly copyhold, it passed by the will of *Thomazine Taylor* by the description of all that copyhold messuage, &c.: or, more properly speaking, whether the will, making use of such description of the property, be sufficient in point of description to direct the uses of her previous surrender? 3d, Whether the entry were tolled by the descent cast? And 4th, Whether the lessor of the plaintiff's right of entry be not barred by the statute of limitations; there having been an adverse enjoyment of the rent for a longer time than 20 years? And supposing the circumstance of the estate having been during all that time enjoyed by a tenant under a lease granted by the testatrix, and which expired only in 1800; the defendant in that case contended, that by not paying rent the tenant had committed a forfeit-

ure more than 20 years ago, which gave the lessor of the plaintiff a right to enter; and not having done so within 20 years, she was on that account also barred. To these several objections to the right of the plaintiff to recover satisfactory answers have been given in the several arguments; and it will not be necessary to go into them at any length. This estate appears by the case to be parcel of the manor, to be holden by copy of court roll, to pass by surrender and admittance, to have been leased under a previous licence from the lord, and to have been surrendered by *Thomazine Taylor*, the testatrix, according to the custom of the manor, to such uses as she in or by her last will and testament in writing should appoint. So circumstanced, it appears to us, that whether holden at the will of the lord or not, the freehold is in the lord, and not in the tenant; and that with respect to all the questions arising in this case it is to be taken and considered as copyhold. And in her will the testatrix calls it "all that copyhold messuage or tenement situate in *Radcliffe Highway*, within the manor of *Stepney*." It is not pretended that she had any other estate to which this description could apply; and supposing it to be a misdescription, which we by no means think it is, there cannot be a doubt but that if by such description she meant the estate in question, it may well pass by such designation. So as to the other objection, that the right of entry of the lessor of the plaintiff is tolled by the descent from *Thomas Danvers* to the defendant *James Danvers*, his son and heir; two satisfactory answers have been given: that the objection does not apply to copyholds, or customary estates, where the freehold is in the lord; nor to cases where the party has no remedy but by entry. In like manner to the objections on the ground of the statute of limitations; the estate having been in the hands of a tenant till 1800, holding under a lease granted by the testatrix, is a sufficient answer; for during that lease the lessor could not enter or support an ejectment: and if a forfeiture were committed, she was not obliged to enter for the forfeiture. (1)

But the point upon which the Court entertained a doubt, and on which they desired a further argument, was, how far the will, as stated in the case, could be considered as a will in writing within the terms of the surrender to the use of her will; and whether such will must not, under the 7th and 9th sections of the statute of frauds, be signed by the party, as thrown out by *Ld. Kenyon* in *Doe ex dem. Tempest v. Dancer*, (a) and according to what is reported to have been said by *Lord Hardwicke* in *Tuffnell v. Page*: that when such will is in writing and signed by the party, that is sufficient for such purpose. But we are now satisfied that a will to direct the uses of a surrender of a copyhold, or of a customary estate passing by surrender, is not within the statute of frauds, and needs not be signed, unless such signature be required by the terms of the surrender to the use of the will. We are not at liberty now to agitate the question, whether immediately after making the statute of frauds it might not have been the sounder construction to have holden that copyholds were comprised within the general words of the 5th and 6th sections of that act, "All devises and bequests of any lands or tenements"; an uniform course of decision since that statute has fixed the law not to be shaken, that the land passes by the surrender and will, taken together, in the same manner as if the devisee's name were inserted in the surrender, and does not pass by the will. And on that account a will of copyhold land is holden not to be a devise or bequest of lands or tenements within the 5th and 6th sections of the act. The 7th section requires all declarations or creations of trusts or confidence of any lands to be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing. And section 9th requires all grants and assignments of any trust or confidence

(1) Vide *Jackson d. Hardenbergh & al. v. Schoonmaker*, 4 Johns. 390. *Ballantine* on Stat. Limit. ch. 2.

(a) This was in 1796. A compromise was recommended by *Lord Kenyon* and acceded to.

to be also in writing, signed by the party granting or assigning the same, or by such last will or devise. It was contended on behalf of the defendant, that under these clauses of the act a declaration or creation of a trust, as also a grant or assignment of any trust, must be in writing signed by the party, or by will signed by the party; and that a will directing the uses of a surrender was a declaration or an assignment of a trust. The gentlemen who argued on the part of the defendant felt the difficulty of pointing out the particular sort of will required by these clauses to declare, or to grant, or assign a trust of lands: they felt that if they insisted on a will attested by three witnesses, they had to encounter every decision respecting a will of copyhold, which had laid it down that a will attested by three witnesses was not necessary: and in no clause of the statute is there to be found any description of a will of land other than such as shall be so attested. When the nature of the conveyance of a customary estate passing by surrender to the use of a will is considered, it will appear plainly, that such conveyance is not within the clauses of the act above referred to; a will of such customary lands is no creation or declaration of a trust, nor a grant or assignment of any trust: but the surrender and will together constitute a legal conveyance: there is no separation of the legal and equitable estate. The statute of frauds looked to no will of lands but such as should be executed and attested as thereby directed. And having prescribed the necessary forms for a devise of *lands* or tenements, it then proceeds to protect in like manner the grant, declaration, or assignment of the *trust* of any lands or tenements; evidently alluding to an *equitable* interest in lands; and the terms *will in writing* and *such will or devise*, used in the 7th and 9th clauses, must refer to such will only as the statute recognizes as a will of land, viz. a will attested by three or four witnesses. We are therefore of opinion, that a will directing the uses of a surrender is not within any of the clauses of the statute of frauds.

And that reduces this case to the only remaining question, Whether the will stated in this case fall within the terms of the surrender; that is, whether it be a will *in writing*? The statute of wills, 32 H. 8. c. 1, gave power to every person, having lands, to dispose thereof by *will in writing*. Under this statute short notes taken by a lawyer from the testator's mouth, for the purpose of being reduced into form, were holden to be a good will in writing, though the testator died before they were so reduced into form. 1 Anderson, 34. Many other instances are mentioned by Lord Coke. So 3 Leon. 79, 2 Keb. 128. And every decision on the statute is an authority as to what in the language of the law is a will in writing. And in *Carey v. Askew*, 2 Bro. Ch. Cas. 56, and in a note to *Wagstaff v. Wagstaff*, 2 P. Wms. 259, Lord Kenyon, when Master of the Rolls, sitting for the Chancellor, 9th May 1786, determined that a draft of a will, the signing and publication whereof were prevented by the sudden death of the testator, was sufficient to pass copyholds surrendered to the use of his will. The draft of the will on which that decision proceeded was produced to us at the time of the argument, and was as stated in the report in the note in 2 P. Wms. For these reasons we are of opinion, that the instrument in question is a will in writing within the terms of the surrender; and that judgment must be for the plaintiff.

Postea to the Plaintiff.

Stead v. Gamble.

7 East, 325. Feb. 12, 1806.

Where to trespass at A., and throwing down, burning, and totally destroying the plaintiff's hedge, there then erected, &c. whereby, &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common; and issue is taken on such

right, which is found for him, and a verdict for the plaintiff with 20s. damages on the general issue, the facts stated in the special plea and found cannot be taken into consideration to shew that the title to the freehold could not come in question on the declaration; and as on the declaration the freehold might have come in issue, and the judge did not certify, the plaintiff is entitled to no more costs than damages.

IN trespass, the plaintiff declared, that the defendant at *Leeds*, &c. with force and arms threw down, pulled up, burnt, and consumed by fire, and totally destroyed 40 perches of hedge or fence of the plaintiff, there then erected, standing and being, whereby a certain close of land of the plaintiff's called *Longclose*, was exposed to damage by cattle, &c. and the wheat there then growing was damaged and destroyed by cattle, &c. Pleas, 1st, the general issue; 2dly, as to the pulling up, throwing down, and destroying the said hedge of the plaintiff, the defendant pleads that the said hedge was before then wrongfully erected and being upon a certain common, &c. over which the defendant prescribes for right of common in respect of a certain mesuſage, &c.; and that the hedge had been wrongfully erected on the said common, and inclosed that part from the rest, so that the defendant could not enjoy his said common as before: and so justifies the pulling up and throwing down the hedge, and thereby in some degree destroying the same, but doing as little damage as possible. The replication took issue on the defendant's right of common; which was found for the defendant, and there was a verdict for the plaintiff on the general issue, with 20s. damages. And the judge not having certified, a rule was obtained calling on the defendant to shew cause why the Master should not tax the plaintiff his full costs.

Lambe shewed cause, and contended that the special plea not going to the whole trespass, being found for the defendant, left the case as if the general issue only had been pleaded; and then, unless the Court could say that upon the face of the declaration it was impossible for the judge to have certified that the title of the land was in question, the plaintiff is not entitled to full costs under the stat. 22 & 23 Car. 2. c. 29. s. 136, there being no certificate. And he cited 2 Ventr. 180, 195, as in point; where to trespass *qu. cl. fr.* not guilty was pleaded, and also a justification; the latter of which being found for the defendant, and a verdict for the plaintiff on the general issue with damages under 40s., he was denied his full costs.^(a) The same principle applies on the other branch of the statute, in trespass for an assault and battery; if the defendant plead the general issue, and a justification as to the assault only, which latter is found for him, and a verdict for the plaintiff for less than 40s. on the general issue, and no certificate, the plaintiff is entitled to no more costs than damages, *Page v. Creed*, 3 Term Rep. 391. Otherwise if the battery as well as assault be justified, and a verdict for the plaintiff with damages under 40s., *Smith v. Edge*, 6 Term Rep. 562. Now here it is charged that the defendant threw down, &c. and burnt the plaintiff's hedge, *there then standing and being*, i. e. at *Leeds*, &c.; which was necessarily a local trespass, in which the freehold might have come in question. And as in *Adlem v. Grinaway*, 6 Term Rep. 281, in trespass for throwing stones, &c. at the plaintiff's windows of his house and breaking the glass, &c. the damages being under 40s. and no certificate, the plaintiff had no more costs than damages, because the defendant might have given *liberum tenementum* in evidence, and so the title to the house have come in question: so here the defendant might have shown that the fence thrown down was his own fence on his own land.

Hullock, contra. According to the construction put upon the stat. 22 & 23 Car. 2, if it either appear that the Judge could not have certified, or that upon the face of the pleadings the title could not have come in issue, the case is not within it, and the plaintiff is entitled to full costs, though the verdict

(a) All the cases are collected in *Hullock on Costs*, 64, &c.

be under 40s., and the Judge do not certify. Now upon these pleadings the title could not have come in question, as it might if only the general issue had been pleaded; for then the defendant might have proved that it was his fence. But by the special plea the defendant alleges that the fence was wrongfully erected on a common upon which he had a right of common; and the issue being joined on his right of common it stood confessed upon the record that the fence was erected on the common; and though if he had a right of common he might justify the throwing it down to enjoy his right, yet he could not justify the total destruction and burning of it, which therefore stood upon the general issue. The whole record must be taken together: and the special plea negatives any claim of the defendant to the soil, so that the title to the soil could not come in question, and the defendant as a commoner could not meddle with the soil, according to *Mason v. Caesar*, 2 Mod. 65; *Cooper v. Marshall*, 1 Burr. 265, and *Sadgrove v. Kirby*, 6 Term Rep. 483. Then if this be not a case within the stat. 22 & 23 Car. 2, there not having been a certificate against costs under the statute 43 Eliz. c. 6. s. 2, the plaintiff is entitled to his full costs under the statute of Gloucester, according to *Milburne v. Read*, 3 Wills. 322. 4.

The Court said they would look into the cases: and now

LORD ELLENBOROUGH, C. J. delivered their opinion.

The question arises on the statute 22 & 23 Car. 2. c. 9, which says, that "in all actions of trespass, assault and battery, and other personal actions wherein the Judge at the trial shall not certify, &c. that the freehold or title of the land mentioned in the plaintiff's declaration, was chiefly in question, the plaintiff, in case the jury shall find the damages under 40s. shall not recover more costs," &c. Here the declaration states, that the defendant, at such a place, with force and arms threw down, pulled up, and destroyed 40 perches of hedge or fence of the plaintiff, *there erected*, standing and being, whereby, &c. And the construction on this statute has been, that it relates only to the two species of action therein specially named, (a) of trespass, and assault and battery; and that the action of trespass is confined to *trespass quare clausum fregit* wherein the freehold or title of the land may come in question; (b) and the question here is, Whether this be such an action in which the freehold or title could come in question; for if it might, the damages being under 40s. and the Judge not having certified, the plaintiff can have no more costs than damages? But in this case, there was, besides the general issue, a special plea justifying the prostration of the hedge, because it was wrongfully erected upon the defendant's common, and debarred him of the exercise of his right of common *in tam amplo modo*; on which right of common issue was taken and found for the defendant: and it was contended that we ought to take into consideration the facts stated in that plea and the finding of the jury thereon, in order to shew that the plaintiff's freehold could not come in question. But we are of opinion that we cannot for this purpose look to the facts stated in the plea: and therefore the enquiry reverts back to the declaration, upon which we think that the freehold might have come in question; and that as the damages are under 40s., and there is no certificate of the Judge that the freehold did come in question, the plaintiff cannot have more costs than damages. Amongst other cases which are collected in Mr. *Hullock's* book upon this subject will be found *Butler v. Cozens*, 11 Mod. 198, and 6 Vin. Abr. 357, in the margin; where in trespass for breaking the plaintiff's lock upon his gate, the damages being under 40s. and no certificate, it was holden that the plaintiff should not have full costs; for the lock was fixed to the post, and the post to the freehold, and therefore the freehold might have come in question. In another case, of *Tomlinson v. White*, Barnes, 121, in trespass for breaking and entering his the plaintiff's house,

(a) Vide *Hullock on Costs*, 41.

(b) *Ib.* 65, &c.

and breaking his cellar door; the jury having found for the plaintiff as to the door 6*d.* damages, and their being no certificate, the plaintiff had only so much costs, because the door was fixed to the freehold, which might therefore have come in question. Again, in Comb. 420, in trespass for pulling down a hedge, whereby the cattle of strangers entered and eat the grass; where the hedge must be taken to have been fixed to the freehold; the plaintiff had no more costs than damages. And in *Hains v. Hughes*, in the same book, p. 324, in trespass for entering the plaintiff's close and cutting his cable, whereby he lost the use of his boat, the plaintiff having 2*d.* damages, had his full costs; but *Holt* said it would have been otherwise in an action for breaking his close and cutting his rails, *for they are fixed to the freehold*. Now this must be considered as an action of trespass *quare clausum fregit*, and destroying and burning the plaintiff's hedge, which was part of the freehold; in which the freehold might have come in question; and the damages being under 40*s.* and no certificate, there can be no more costs than damages.

Rule discharged.(a)

Line v. Lowe.

7 East, 330. Feb. 12, 1806.

A defendant superseded for want of being charged in execution within two terms *after* judgment cannot be again arrested and taken in execution upon the same judgment: *aliter*, if superseded for want of proceedings in time *before* judgment.

THE defendant, who was in custody on mesne process, having been superseded for want of being charged in execution within two terms after final judgment, was afterwards taken in execution upon a writ of *capias ad satisfaciendum* issued upon the same judgment; whereupon a rule *nisi* was obtained for setting aside the writ, and discharging the defendant out of custody, for irregularity, with costs; on the ground that the body of the defendant, having been once discharged out of custody for want of being charged in execution in due time *after* final judgment, could not be taken again upon the same judgment; which was said to have been so ruled in *Wright v. Kerswill*, Barnes, 376, and recognized in *Blandford v. Foot*.(b)

Wood shewed cause, and said, that this was a mere *dictum* in the case in *Barnes*, which was repeated in the other case, but was not the point in judgment in either case: for in the first, the defendant, who had been discharged out of custody on entering a common appearance for want of the plaintiff's proceeding to judgment in due time, was taken and holden in execution after judgment in the same cause: and in the last case the defendant was holden liable to be taken in execution in an action on the former judgment, *having never been charged in execution before*, though he could not be holden to special bail in such action. Then as the defendant would have been liable to have been taken in execution in an action brought upon the judgment, it is more beneficial to him to be charged in execution on the same judgment, without the accumulation of the costs in the second action.

Wigley, in support of the rule, relied upon the distinction laid down in the books, that if the defendant be discharged out of custody *before* judgment, there he may be taken in execution after judgment: *aliter* if superseded *after* judgment: for which he referred particularly to *Impey's Instr. Cler. K. B.* 4th edit. p. 523, who refers to a note on the Rule of T. 2 Geo. 1, and this is supported by the cases before mentioned, and by *Rose v. Christfield*, 1 Term Rep. 591, where the generality of the rule once contended for, that a prisoner once

(a) Vide *Martin v. Vallance*, 1 East, 350.

(b) Cowp. 72, and vide *Topping v. Ryan*, 1 Term Rep. 273.

supersedeable always continues so, was qualified and restricted to cases where he remains in the same custody and under the same process.

LORD ELLENBOROUGH, C. J. said, that the Court would inquire into the practice; and the next day, his Lordship said, that upon looking into the book of Rules and Orders of K. B. there was a reference from the rule of T. 2 Geo. 1, (a) to a note which struck their notice, stating that if the defendant supersede for want of proceedings before judgment, yet the plaintiff may, after judgment obtained, take the defendant in execution: *but otherwise if the defendant supersede for want of charging in execution: (b)* but no authority was quoted in support of it. That they had, however, found an express authority for it in *Clarke v. Venner*, M. 10 Geo. 2, reported by Sir George Cooke in his Cases of Practice in C. B. p. 136. "A motion to discharge the defendant out of execution, who was before discharged for want of the plaintiff's proceeding to judgment: afterwards the plaintiff proceeded to judgment, and took the defendant in execution. Mr. Justice Denton said he had consulted with the Justices of the King's Bench, and one of the judges told him, that the constant practice of that Court was, that where a defendant was discharged for want of proceeding to judgment, the plaintiff may afterwards proceed to judgment, and take him in execution thereon. *But if the plaintiff had proceeded to judgment, and the defendant was discharged for want of being charged in execution, he should be totally discharged*, and cannot after that be charged in execution." The same thing is said in *Blandford v. Foot*, which refers to *Wright v. Kerswill*. We are therefore of opinion, upon the authority of these cases, that the defendant, having been superseded for want of being charged in execution in due time after judgment, cannot now be taken again in execution upon the same judgment.

Rule absolute.

Dale, Qui Tam v. Beer.

7 East, 333. Feb. 12, 1806.

It is sufficient in a *qui tam* action to entitle the plea with the names of the parties, without the addition of *qui tam*, &c. to the plaintiff's name.

THE plaintiff sued in debt, as well for himself as for the poor of the parish of *West Moulsey* in *Surrey*, to recover certain penalties upon the stat. 13 Geo. 2. c. 19, for entering a running poney. The defendant put in a plea of *nil debet*, intitled, "*Walter Beer* at the suit of *Thomas Dale*." On which the plaintiff signed judgment as for want of a plea, on the ground that the plea was improperly entitled, this being a *qui tam* action, wherein the plea should have been entitled, *Dale Qui tam*, &c.: and now, upon a rule for setting aside the judgment for irregularity with costs, which was supported by *Reader*, and opposed by *Laves*,

The Court were of opinion that the judgment was irregularly signed; that the plea was well enough entitled, without the addition of the character in which the plaintiff sued: and made the

Rule absolute.

(a) There is no paging to the edition of 1747, but it is p. 210 of edit. of 1795. The quotation here made is from the former edition.

(b) There is no reference to any authority in the original edition: but a corresponding note in the edition of 1795, p. 300, refers to *Hall v. Howes*, Cas. temp. Hardw. 244, which does not go fully to the point in question.

MEMORANDA.

AT the latter end of this Term, Lord **ELDON** resigned the Great Seal, and was succeeded in the office of Lord High Chancellor, by the Honourable **THOMAS ERSKINE**, who was created a Peer of the United Kingdom of *Great Britain and Ireland* by the title of Lord **ERSKINE**, Baron of *Restormel Castle*, in the county of *Cornwall*; and was afterwards sworn of His Majesty's Most Honourable Privy Council. His Lordship took his seat on the Bench of the Court of Chancery on the last Day of Term.

ARTHUR PIGGOTT, Esq. one of His Majesty's Counsel learned in the law, succeeded the Honourable **SPENCER PERCEVAL** as His Majesty's Attorney-General; and was knighted.

SAMUEL ROMILLY, Esq. one of His Majesty's Counsel learned in the law, succeeded Sir **VICARY GIBBS**, Knt. as His Majesty's Solicitor-General, and was knighted.

THOMAS JERVIS, Esq. was appointed one of His Majesty's Counsel learned in the law.

CASES

IN

EASTER TERM,

IN THE FORTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

MR. Serjeant *Lens* and Mr. Serjeant *Best*, having been appointed His Majesty's Serjeants learned in the Law, took their Seats within the Bar at the beginning of this Term: as did also *Francis Hargrave* Esq. on being appointed one of His Majesty's Counsel learned in the Law, and *Philip Dauncey* Esq. on having a Patent of Precedence.

Turner v. Richardson and Another, Assignees of Barber, a Bankrupt.

7 East, 335. April 24, 1806.

Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term, or support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendants by assignment thereof.

THE plaintiff declared in covenant as assignee of the residue of a term of 40 years and a half, holden under the crown, in certain premises upon an indenture of demise thereof, dated 1st of *January* 1789, made by a prior termor, through whom he claimed, to *Barber* the bankrupt, for 34 years from the ensuing *Lammas*, at the yearly rent of 132*l.* payable at *Candlemas* and *Lammas*, by virtue of which indenture *Barber* entered and was possessed. The declaration then stated, that after *Barber* became so possessed of the premises, viz. on the 1st of *January* 1796, all his estate, right, title, interest, and term therein came to the defendants by assignment thereof duly made, by virtue of which said assignment the defendants entered into the demised premises and were possessed thereof for the residue of the term, &c. and assigned for breaches an arrear of rent for three years, ending on *Lammas* day 1804, to the amount of 396*l.* 18*s.* which the defendants refused to pay; and want of repair, during the possession of the defendants. The defendants pleaded, 1st, that all the estate, right, title, interest and term of *Barber* in the premises, did not come to them by assignment thereof. 2d, That the defendants did not enter into the demised premises. 3d, That the defendants were not possessed thereof for the residue of the term. 4th, That *Barber*, being a trader, and indebted, &c. be-

came a bankrupt, &c. and that his personal estate and effects were assigned and transferred by the commissioners to the defendants in trust for his creditors; but that the estate, right, title, interest, and term of *Barber* in the demised premises, was not specified in the indenture and assignment from the commissioners to the defendants as assignees as aforesaid, *and never came to the defendants by assignment thereof*, except to the assignees of the estate and effects in general terms of *Barber* the bankrupt: and that the defendants *have not at any time hitherto taken possession of the demised premises*. There was a 5th plea similar to the last, only stating in the conclusion that the defendants *had not at any time hitherto entered into the demised premises*; and a 6th similar plea, alleging that the defendants *had not at any time hitherto consented or agreed to accept* the estate, right, title, interest, and term of *Barber* of and in the demised premises, *as part of his estate and effects*; and a 7th similar plea, alleging that the defendants had *renounced the estate, &c. and term of Barber*, of and in the demised premises from being to be considered as part of his estate and effects. Issues were taken on the three first pleas; and the plaintiff replied to the 4th, that the defendants did take possession of the premises; to the 5th, that they did enter; to the 6th, that they did agree to accept the estate of *Barber*; and to the 7th, that before they renounced, they accepted and were possessed of the residue of *Barber's* term. The rejoinder took issue on the replications to the 4th, 5th, and 6th pleas; and to the replication to the 7th plea, the defendants rejoined that they did not accept, nor were possessed of, the residue of the term before they renounced; and on that also issue was taken.

At the trial before *Chambre, J.* at the last assizes at Newcastle, *Mr. Fenwick*, the only witness, proved that he was employed as an attorney by the defendants in 1796, and by whose direction he advertised the premises in question for sale. That there was a demand of about 500*l.* by the plaintiff, the landlord, on *Barber*, for the rent in arrear, and for the repairs of the property in question, which had been several times demanded: on which account *Mr. Fenwick* advised the defendants to advertise the property for sale, in order to try whether it were of any or what value, and whether it would countervail the charges upon it; and if it would produce sufficient to pay the landlord; his demand being the principal object, as the other debts were mostly satisfied. Accordingly a sale was advertised, (a) which was attended by *Mr. Fenwick* in company with *Richardson*, one of the assignees of *Barber*, and the property was put up in different lots, to induce persons to bid; but there was no bidder. *Richardson* said, that an offer had been made for a meeting-house (the principal part of the premises;) but the offer was so small that *Mr. Fenwick* advised him not to accept it, as it would do nothing to liquidate the plaintiff's demand; and nothing was in fact ever received by the assignees for it. After this *Mr. Fenwick* advised a valuation of the premises, but being informed that they were worth nothing, he advised the defendants, his clients, not to interfere with the property. Upon this evidence the learned Judge thought, as the defendants did not appear to have taken possession either actually, or by receiving any rent, or to have ever paid rent either to *Sir J. Turner*, or to the plaintiff, who claimed from him, that the single circumstance of endeavouring in the year 1796 to ascertain the value of the

(a) The advertisement was in these terms; "To be sold by public auction, at the house of *H. B. Pigmarket, Newcastle-upon-Tyne*, on *Monday 19th Dec. 1796*, subject to such conditions of sale as shall then be produced, all those several messuages or dwelling-houses, one of them late the *Blue Bell* public house, and tea shops, and also the Protestant Dissenting Meeting-house, Parsonage-house, School-room, waste-ground, and premises, held by lease for 34 years and a half from *Lammas 1789*, under *Sir J. C. Turner Knt.*, situate in or near the *Castle Garth, &c.* let to different tenants at upwards of 200*l.* per annum. The respective tenants, on application, will shew the premises, and further particulars may be known by applying at the office of *Messrs. Fenwick, Newgate-street, Newcastle.*"

premises by the means stated by the witness, and which appeared to have been done for the purpose of determining whether it were advisable for them on the part of the creditors to accept the estate or not, was not sufficient to fix upon the defendants the character of assignees of *Barber*, the bankrupt's term, so as to render them responsible for the performance of the covenants in his lease: on which the plaintiff submitted to be nonsuited. In last *Michaelmas* term, a rule nisi was obtained for setting aside the nonsuit, &c. upon the ground that the assignees, by putting the premises up to sale, had taken to and treated them as their own; and could not afterwards renounce them because the bargain proved disadvantageous. And a case of *Broome v. Robinson*, tried before Lord *Kenyon*, C. J. at *Westminster*, in *December* 1800, was cited: where the plaintiff, the landlord of a house, brought his action for use and occupation from *Lady-day* to *Michaelmas* 1800, against the defendant, who was the assignee of a bankrupt, to whom the house has been let. After the bankruptcy, in *January* 1800, the plaintiff applied to the defendant to know if he meant to take the bankrupt's interest in the house; to which the defendant answered, that if he did not let it, by *Lady-day* he would give it up: and at *Lady-day* the defendant paid the rent, and offered the agent the key. It was contended that the defendant, as assignee, was not liable. But Lord *Kenyon*, C. J. held, that though he might have refused it at first, yet he could not take it in part, and afterwards reject it when he found it would not answer, and he could not let it. And the plaintiff recovered.

Park and *Littledale* now shewed cause, and distinguished this from the case last cited; for there the assignee had refused at first to deliver up the premises when put to his election by the landlord. And they referred to *Bowdillon v. Dalton* and others, Peake's N. P. Cas. 238, and 1 Esp. N. P. Cas. 233, where Lord *Kenyon* considered that the assignees of a bankrupt lessee were not liable for the rent, unless they had taken possession of the premises. And in *Eaton v. Jaques*, Dougl. 461, *Buller*, J. said, that not even an absolute assignment was sufficient to charge an assignee without possession. Now here the assignees never took to the term, or ever had possession, either actual or implied, as by the receipt of rent. They only endeavoured to ascertain the value by advertising the premises for sale, as it was their duty to do; the result of which determined them not to take to the lease. [Lord *Ellenborough*, C. J. before the advertisement for sale was produced, inquired whether the defendants had therein held themselves out as the owners of the lease; which, it was suggested, might have been evidence to go to the jury: but upon the production of the advertisement as before stated, nothing of that sort appeared. And as there was no bidding at the sale, no question arose as to the auction duty, as in the case of property bought in by the owner.]

Cockell, *Serjt.* and *Richardson*, in support of the rule, contended, that the assignees taking upon themselves the power of disposing of the premises, by putting them up to sale, was tantamount to an actual possession; and precluded them from saying that they had not taken to the lease; for unless they had, they could have no power of selling it. The landlord might not have chosen to have the premises put up to auction, if they were to be thrown back upon his hands. [Lord *Ellenborough*, all that does not vest in the assignees must remain in the bankrupt.] Notwithstanding the doctrine laid down in *Eaton v. Jaques*, which has often since been disputed, (a) it is sufficient that there has been an actual assignment in order to charge the assignee, without an actual entry. But particularly in the case of assignees of a bankrupt, in whom the law vests the property of the bankrupt; though they may renounce

(a) They referred to *Walker v. Reeves*, Dougl. 461, n.; *Stone v. Evans*, Sittings after Mich. 39 G. 3, where the question was, Whether the assignee were liable to the ground rent; and Lord *Kenyon* said he could not subscribe to the doctrine laid down in *Eaton v. Jaques*. And vide what was said by the same noble and learned Judge in *Westerdell v. Dale*, 7 Term Rep. 313.

that which is not beneficial. But they cannot make such renunciation after they have once assented to take the interest devolved upon them : and no stronger instance of such assent can be given, than holding themselves out to the world as having power to sell it ; for no sale of property can take place but by the owner of it ; and it is merely giving the transaction a colour to say, that it was only an experiment to ascertain the value. At all events it was evidence for the jury. [*Le Blanc*, J. observed, that when the Judge gives his opinion upon the evidence, and the plaintiff submits to be nonsuited rather than risk a verdict with that direction, he cannot afterwards object that any fact has been withdrawn from the consideration of the jury.] To which they said, that they had submitted in deference to the opinion, expressed by the learned Judge, of the law arising out of the facts in proof.

LORD ELLENBOROUGH, C. J. This is an action brought by the landlord of certain premises against the assignees of a bankrupt lessee, charging them with the breach of covenants, which, if they were assignees of the land, they would be liable to ; and in this action it is necessary, according to the usual form of declaring which has been pursued, to charge that the premises had come to the defendants *by assignment*, that by virtue thereof they had entered into and were possessed of the premises for the residue of the term ; and upon all these facts issues are taken. There was no proof of any actual entry or possession by the defendants, and therefore the question comes to be raised upon the other issue, whether all the estate, right, title, interest, and term, of the bankrupt in the premises came to the defendants *by assignment* thereof duly made ? Now it has been decided, that assignees of a bankrupt are not bound to take what Lord Kenyon called (a) *a damnosa hereditas* ; property of the bankrupt, which so far from being valuable, would be a charge to the creditors ; but they may make their election : if, however, they do elect to take to the property, they cannot afterwards renounce it because it turns out to be a bad bargain ; according to what Lord Kenyon said in the other case of *Broom v. Robinson*. What then is the evidence, on which this issue is endeavoured to be sustained ? It appears that the assignees, being anxious to know whether it were worth their while to take to the premises for the benefit of the creditors, made an experiment to ascertain their value. If the property were valuable to the bankrupt's estate they would have been guilty of a breach of duty to the creditors in abandoning it ; and therefore it was their duty by making such experiment to ascertain that fact. For this purpose they published an advertisement, in which they did not state that the premises belonged to them ; they do not even state for or by whom they are to be sold, but only generally, that there is a saleable term. If a bidder had been found, and they had accepted the bidding, then that would have been evidence of their assent to take to the premises. But no bidder offered himself. They therefore kept it in suspense to the time when the bidding was to be made whether they would take to the term or not ; intending, if a bidder offered whom they thought it worth their while to accept, they would take to it. No such opportunity occurred, and therefore there was no assent on their part to take it.

GROSS, J. The question is, as my Lord has stated it, whether the premises came to the defendants by assignment, that is, whether they were possessed by the defendants as assignees of the term ? The defendants stood in a different situation from persons in general. They were assignees of a bankrupt's estate for the benefit of his creditors : and they were to consider whether it were for the benefit of the creditors that they should take to this property, or waive it. On the one hand, if they entered and were possessed, they became liable to be sued upon the bankrupts covenants for rent and non-repair, which might amount to more than the value of the lease : on the other hand, if the

(a) In *Bourdillon v. Dalton and Others*, ante, 339.

lease were valuable, and they did not take to it, the creditors would have had a right to call upon them for neglect of their duty. In order therefore to ascertain the fact of the value, they advertised the property for sale, without stating, however, that it was in their possession; it was no more than making an experiment to ascertain whether the property were of any and what value. There were no bidders: it therefore turned out to be of no value to the defendants as assignees of the bankrupt's estate, and consequently they did not take possession of it. The most which could have been left to the jury was, whether the defendants were in fact *possessed* of the premises: and it is plain from the evidence, that finding they were of no value, they never did enter into possession; and in the true sense of the issue, the defendants were not assenting to the assignment of these premises to them.

LAWRENCE, J. It is admitted that some *assent* of the defendants to the assignment to them of the premises is necessary in order to charge them with the bankrupt's covenants: and the question is, whether there were any evidence of such assent? It is said, that there was, because they held themselves out to the world as the *owners* of the property, which they were willing to sell: but the act which they did does not amount to that: they did not by the advertisement engage that they were then the owners; but only that if any person would become a buyer they would do that which would make a good title to it. Therefore, if the question had gone to the jury there was not sufficient evidence for them to find that the defendants had taken to the lease. The advertising for sale was a mere experiment to enable them to judge whether the lease were worth their taking; the result proved that it was not; and therefore they did not assent to the assignment of it to them, which assent is admitted to be necessary in order to bind them.

LE BLANC, J. The houses were in lease at the time, and therefore the assignees were not in the actual possession of them, and they never acquired a virtual possession by the receipt of the rents. Then when the law says that assignees of a bankrupt may take to the bankrupt's property or not according as it is or is not beneficial to the creditors, the same law, in order to be consistent, must also say, that they may do those previous acts which are necessary to ascertain whether the property be beneficial or not before they take to it. Then having done that in the present case which was the best way of ascertaining whether the lease of these premises were beneficial or not, by putting it up to auction, and not having disposed of it, we cannot say that they have taken to it as assignees of the term. It might as well be said to be a taking to the interest of the bankrupt in the premises if they had sent a surveyor to ascertain what the value of the property was. (1)

Rule discharged.

The King v. The Bishop of Oxford.

7 East, 345. April 24, 1806.

In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to license a curate only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate of the church of P., without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ.

A WRIT of *mandamus* issued in *Michaelmas* term last to the bishop; which, reciting that the Rev. Isaac Knipe, clerk, *had been duly nominated and appointed by the inhabitants of the township of Piddington*, in the parish of *Am-brosden*, in the county of *Oxford*, or the major part of them, *to be chaplain or*

(1) [See *Grant v. Gill*, 2 Wh. 42.—W.]

curate of the church or chapel of Piddington; and that by virtue of such nomination and appointment, he ought to be licensed by the bishop to officiate as chaplain, &c. and to enjoy all the privileges and profits belonging to the said place and office of chaplain. And that after such his nomination and appointment, he did in due manner request the bishop to grant him his licence; yet that the bishop, well knowing the premises, &c. refused, without reasonable cause, to licence the said J. K. &c. to the damage and grievance of the said J. K. as also of the inhabitants of the said township; therefore commanded the bishop to grant the said licence. Whereupon a rule was obtained in the last term, calling upon the prosecutor to shew cause why the writ should not be quashed for the insufficiency thereof apparent upon the face of it; inasmuch as it neither suggests a custom for the inhabitants to elect a chaplain who was entitled to the use of the pulpit without the consent of the rector; nor the consent of the rector in case there be no such custom; without one or other of which the *mandamus* would be against common right and nugatory.

Miles and *Manley* now shewed cause against the rule. It is sufficient upon the face of this prerogative writ to state generally the right of the party applying; but though any thing be omitted which ought to have been suggested, in order to entitle the party to what he prays, that, according to Lord *Holt*, in *Peat's* case, 6 Mod. 310, will be *good matter to return*. That the party was *debito modo electus* is all that is stated in a *mandamus* to a corporation to admit and swear in a corporator. So the *mandamus* to the dean and chapter of *Exeter*, Trem. P. C. 467, to admit and swear in one *Yolland* to the office of one of the eight men of the parish of *Ashburton*, in the county of *Devon*, merely states that he was *duly elected* into the office: and the circumstances which went to shew that he was not duly elected were stated by way of answer in the return. So a *mandamus* to the dean and chapter of *Dublin*, 1 Stra. 536, and 8 Mod. 27, to admit one to a stall in the choir, and a voice in the chapter, only recites that the party had been legally instituted and inducted to his stall and voice, which the dean and chapter had refused him: and they in their return state the cause of that refusal. And in *Rez v. Ward*, (a) where one of the objections taken to the writ (being a *mandamus* to the defendant to admit and swear in *H. D.* to be deputy registrar of the archbishop of *York's* Court) was, that it was not averred in the writ that the defendant was the person bound to admit and swear in the deputy registrar; the answer given, which the Court appears from the report to have thought sufficient, was, that if *Dr. Ward* were not the person to whom the executing the writ belonged, he should have returned so. (b) They admitted that since the cases of *Rez v.*

(a) 2 Stra. 893. Fitzg. 123, and 1 Barnard. 252. 204. The writ in this case was directed to the defendant as *commissary of the province of York*. *Ford's MS.*

(b) This was not the true answer which the Court gave to that objection; for it appears from Mr. *Ford's MS.* (the best reports of that period, for the use of which I am much indebted to Mr. R. *Ford* his son) that *Filmer* objected that it was suggested in the writ that the commissary was bound to admit by his office, which he said was a usual clause in all writs of this nature, and that it was void unless it appeared that the person to whom it was directed was obliged by his office to do the thing commanded in the writ. To this point see Trem. Entr. 452, 3, 4. 461. And it was said that no return, but that he was the proper officer, would make the writ good; for nothing shall be taken by inference to support a bad writ; for, were that allowable, much less would be requisite whereon to found a peremptory *mandamus* than an original one: on which, he said, the Court always required an affidavit that the person to whom the writ was prayed was the proper officer to execute it, and that he had refused to do the act, which the Court might compel him to do by the writ; facts which he argued ought to be inserted in the writ. To which it was answered by *Strange*, that though the writ does not expressly say, that *Dr. Ward* is the proper person to swear in Mr. *Dryden*, yet it speaks what amounts to a literal affirmation; for it recites that application had been made to him to swear in Mr. *Dryden*, and that he *minus jure* had refused it; an expression very absurd, unless he were the officer for that purpose: as was another allegation in the same writ, viz. that his refusal was *in contemptum domini regis*. Besides, the mandatory part of the writ

The Bishop of London, 1 Term Rep. 331; *Rex v. Field*, 4 Term Rep. 125, and *Rex v. The Bishop of Exeter*, 2 East, 462, the Court would not grant a *mandamus* to the ordinary to licence a lecturer or chaplain to use the rector's pulpit, unless the consent of the rector were shewn, or a custom in the inhabitants to elect without such consent; but they contended that it was sufficient if such a custom were shewn by affidavits, as it was in this case, founded on a deed in 1428; and not denied by any counter affidavits; and it was not necessary to be stated in the writ itself. [Lawrence, J. If the inhabitants can only nominate the curate by a custom, how can the Ordinary negative that in his return, if the custom be not stated in the *mandamus*? Lord Ellenborough, C. J. It will be said in answer to a writ so framed as this is, that the inhabitants may have nominated the curate, but *non liquet* that the bishop is bound to licence him; for the only effect of such a nomination is to give the party a ground for asking the rector's consent, without which the bishop cannot licence him. Then should not such consent be stated in the writ calling upon the bishop to grant such licence?] There is no instance of a *mandamus* being quashed for only stating that the party was *debite modo electus*. The frame of the writ is as general as a declaration in an action on the case, the strictness of which has been much relaxed; as in actions for not grinding corn at an ancient mill, for toll, for a way, &c. it is sufficient to declare upon the plaintiff's possession of the mill, or the toll, or the way, without setting out by what title he was possessed. [Lawrence, J. I do not see the analogy between those cases and this, for a party may acquire rights from his possession; but here the nominee is not in possession, but is seeking to acquire it. The difficulty is for the ordinary to deny in his return the existence of a custom which is not alleged in the writ, to which such return is an answer. Where a *mandamus* issues to a corporation, to admit one to his freedom, who claims it in right of having served an apprenticeship to a corporator, is it not always necessary to state in the writ that by charter or prescription such persons were entitled to their freedom? [Lord Ellenborough, C. J. The writ assumes that nothing more is wanting to perfect the party's right to a licence from the bishop than the nomination and election of the inhabitants; whereas something else is required, either the consent of the rector, or a custom which supersedes the necessity of such consent.] The objection would apply to all cases where the writ states generally that the party was *debite modo electus*. (a)

Sir V. Gibbs and Abbott, in support of the rule, observed upon the precedent cited from Trem. 467, that it appears by the report of the case in *Showers*, 2 Show. 229, that the generality of that *mandamus* made it defective, and that a special *mandamus* was directed, which is to be found in the next page of *Tremaine*, wherein the custom is set forth. The distinction is this; where the facts stated in the writ are sufficient, if not denied, to entitle the party to have what he claims, there it is no objection that they are stated generally: as if a *mandamus* to swear in one who has been elected a freeman of a corporation state that the party was *duly elected* a freeman of the corporation, and

being in the disjunctive, either that Dr. Ward should swear in *Dryden*, or shew good cause to the contrary, (as that he was not the proper person would have been;) his returning another excuse for not obeying the writ is a plain indication that he is the proper person to do this act. He said that there were many writs without this averment; and particularly that between the King and Clapham, 1 Vent. 110, as appears by the record, (of which he said that he had a copy.) The case of *The King v. Ipswich* was mentioned, where a writ was directed to that corporation by a wrong name, and a return made by the corporation in their right one; and Filmer argued that if the return in that case would not make the *mandamus* good, how can it do it in this?

Curia. We think the particulars before noted in the writ, and the matter contained in the return do sufficiently ascertain Dr. Ward to be the proper person to swear in *Dryden*, &c.

(a) *Precedents in Tremaine* 450 and 496, were referred to, the one for admitting a mayor of a borough, the other for restoring a fellow of the college of physicians; but in both these the party is stated to have been *debite electus secundum consuetudinem*, &c.

ought to be sworn in; as, if these facts be true he ought to be sworn in, that general mode of stating his right is sufficient. But where it may be answered, that admitting all the facts stated to be true, yet that the party is not therefore entitled to what he asks, that is an objection to the writ itself. In this case the real question between the parties cannot be raised by the denial of any fact stated in the writ: for admitting Mr. *Knipe* to have been duly elected and nominated by the inhabitants to be curate, it does not follow that he has a right to officiate without the consent of the rector; which is not stated, nor any immemorial endowment or custom stated from which such consent is necessary to be implied; and clearly the common law does not give him such a right. Where the common law casts a right upon the party duly elected by certain persons to an office, there it is sufficient to state his right by such election generally; but if he claim against common right, he must shew how. This distinction is pointed out by the difference of the precedents in the books. Therefore in *Needham's* case, Trem. 460, which was a *mandamus* to the archdeacon of *Norwich* to admit and swear *Needham* into the office of churchwarden, as the parishioners, by whose election he claimed, could only have a right to elect a churchwarden by custom, such custom is stated upon the face of the writ. If this were a declaration in an action on the case against the bishop for refusing to licence, it would be demurrable for the same reason that this writ is bad; for though the plaintiff may recover if a sufficient title in him appear to the Court, though it be defectively stated, yet a defective title cannot be aided by any intendment. They also referred to *Harris's* case, Trem. 471, *Dunkin's* case, ib. 501, and *Baker v. Baker*, ib. 506, as instances, amongst others, of special writs of *mandamus*, disclosing all the circumstances on which the aid of the several writs was prayed: and particularly to *Rex v. The Justices of the W. R. of Yorkshire*, 7 Term Rep. 52, where a writ of *mandamus* to them, to make an order for the payment out of the county rates of the fees of the coroner for a peculiar liberty, was quashed, because the writ omitted to state that that liberty contributed to the county rates. And Lord *Kenyon* said, that "the prosecutor should have alleged in the writ all those facts which were necessary to shew that he was entitled to the relief prayed; and that he had a right to call upon the magistrates to do that, for the non-performance of which he sued out this compulsory writ."

Lord ELLENBOROUGH, C. J. The bishop is required by this writ to do an act, which he is alleged to have refused doing in breach of his duty. The writ then should state those facts which constituted his duty, and induced an obligation upon him in point of law to do the act required. But here it only states, that *J. Knipe*, clerk, had been duly nominated and appointed by the inhabitants of the township to be curate of the church; and that by virtue of such nomination and appointment he ought to be licensed; but it states no consent of the rector; nor any endowment or custom which might entitle the party to the use of the church in virtue of such mere nomination of the inhabitants. In the absence, then; of every foundation of this sort, can it be said to state even a *prima facie* title to call upon the bishop to grant his licence? It is the well known law of the land, recognized in the cases referred to, that the rector has the exclusive right to the use of his pulpit, without some custom, or some other competent agreement with him, to induce a right in some other to interfere with that exclusive right. Nothing is here stated, but the nomination and appointment of the curate by the inhabitants; but it does not follow from thence that the consent of the rector is superseded; the writ should have gone on to state either the consent of the rector for the time being, or something which supercedes the necessity of such consent. As to the precedents referred to, where *debito modo Electus* has been deemed sufficient to found the party's claim to be admitted and sworn in a member of a corporation: if there has been a due election of him, it follows that he is entitled to be admitted and sworn in. So in declaring in case for a right of way appurtenant to a

house, it is a sufficient *prima facie* title if the party be in possession of the house to which such right of way is appurtenant. But this is quite a different case, not depending upon possession; and a declaration in case in this general form against the bishop for refusing his licence would be demurrable. There is no *prima facie* title stated, which would be sufficient, to call upon the bishop to make a return: the writ therefore must be quashed.

Per Curiam,

Writ quashed. (a)

The King v. The Company of Free Fishers and Dredgers of Whitstable, in the County of Kent.

7 East, 353. April 25, 1806.

Where a corporator, who was entitled to divide a certain share of the profits of a fishery which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged, the Court refused a *mandamus* to restore him to his office; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal or he were not guilty of a breach of it, or had been unlawfully suspended) or, considering the corporators as partners in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withholden from him.

A RULE was obtained in the last term, calling on the company to shew cause why a writ of *mandamus* should not issue, commanding them to restore *Wm. Adley* to the office of a freeman of the said company. This was grounded upon an affidavit of *Adley*, stating, that the company was incorporated by virtue of an act of the 33 G. 3. c. 42, and that as a freeman he was entitled to a proportionate share of the concerns of it. That before the incorporation he was and still is one of the lessees of a certain oyster ground, called the *Sea Salter Ground*, from the dean and chapter of *Canterbury*. That by the said act all the powers before belonging to and used by the company, amongst others that of making by-laws for the regulation of their fishery, were vested in the corporation. That the custom of the company in working their oyster grounds, and dividing their profits, is, that during the season for the dredging of oysters, every member, either personally or by deputy, is obliged, on certain days appointed by the foreman, the principal officer of the company for the time being, to dredge such a quantity of oysters as the foreman directs, which is called a stint, and to deliver the same for the benefit of the company: thereupon the foreman pays the member a certain sum for the day's work. That the money arising from the sale of the oysters is then applied to the payment of the interest of debts due from the company, and the residue divided amongst the members. That on the 22d of July 1805, at a manor court, it was ordered, that if any freeman should engage in the business of sending oysters to market for sale from any oyster grounds on the *Kenish* shore, or work the same, &c. other than the oyster grounds of the company, such freeman should forfeit 10l. for the use of the company; and if he should refuse to pay the fine to the water bailiff of the manor for 24 hours after demand by such water bailiff, such freeman so neglecting or refusing should from thenceforth, and until such fine be paid, be wholly excluded from all share of the profits to be made thereafter by or from the joint trade in oysters of the freemen of the company; and such profits should, in the mean time, be divided, as if such freeman so neglecting or refusing had wholly ceased to be a freeman of the said company, &c. That the deponent, as such freeman, on the 29th of October last, performed his stint or day's work in the company's fishery, and delivered the oysters according to the custom, and therefore became entitled to re-

(a) See the same case upon another point, *post*, 600.

ceive from the foreman the sum of 6s. which sum he demanded of the foreman, who refused to pay him; alleging as a reason for such refusal, that he should abide by the order of the Court, and should not pay the deponent until he had paid the 10*l*. agreeable to the order of Court, for working and holding another oyster ground. That the water bailiff had also demanded of him the 10*l*. fine, which he refused to pay. The deponent then swore, that he had had no notice of the holding of any meeting of the company, at which he was adjudged to have offended against any order of the Court; nor was he summoned to attend, or had notice of any complaint against him for any breach of any order of Court; nor was called upon to make any defence against any charge, or to shew cause why he should not pay the 10*l*. or why he should not be removed or suspended from his office of freeman, &c. And that by the said proceedings of the company and of their foreman he is deprived of his share of the profits of the company. In answer to this, there was an affidavit on the merits, as to the offence committed by *Adley* within the by-law, and his being summoned to attend the Court before the fine was imposed: but this was not entered into; for

Sir V. Gibbs and *Bayley, Serjt.* on shewing cause, objected, that at all events the application for a *mandamus* to restore *Adley* to his office was premature; as he was not removed from his office, but only suspended from the receipt of certain profits attached to it, for which no *mandamus* lies. (a) That in effect this would be a *mandamus* to the company to pay him 6s., for which, if the foreman unjustly refused payment, an action would lie to recover it.

Shepherd, Serjt. Wood, and Dampier, in support of the rule, said, that as the perception of the profits was the only mode of enjoying the franchise, to suspend the party from this was in effect to suspend him from his office; and the by-law declares, that until the fine be paid, "he shall be wholly excluded from all share of the profits, &c. as if he had wholly ceased to be a freeman of the company." That there was as much reason for granting a *mandamus* to restore one unjustly suspended, as one unjustly removed from an office; the effect being the same.

Lord ELLENBOROUGH, C. J. The party, notwithstanding the suspension, has still a right to attend and vote at corporate meetings: the suspension therefore is not equivalent to a removal from his office: but he is left in possession of his office, and only excluded from participating in the profits. Then, if he be legally entitled to receive his share of the profits, he may have his action for the tort against those who disturb him in the perception of them. If it were a proper case to grant any *mandamus* at all, it should be a *mandamus* to the company to pay him the 6s. his share of the profits, which is withholden from him; for that is the specific grievance which he has to complain of.

Lawrence, J. asked what remedy the party would have had, if the foreman had, of his own accord, refused to pay him the 6s.? To which it being answered, that the fishery being in the nature of a partnership, he must have gone into equity; *Lawrence, J.* said, that the same remedy was open to him now.

Per Curiam,

Rule discharged.

(a) *Rex v. The approved men of Guildford*, 1 Lev. 162. 1 Keb. 868. 880. The *mandamus* was at first refused to restore one to his office who was suspended; but in the following year he appears to have been restored. T. Ray. 152, and 2 Keb. 1. And vide *The King v. The Mayor, &c. of London*, 2 Term Rep. 177, where the Court seemed to doubt whether a *mandamus* might not go to restore an officer to the exercise of his functions, if it appeared that he was suspended without just cause.

Spenceley, Qui Tam, v. Schulenburgh.

7 East, 357. April 25, 1806.

An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client : the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney.

IN an action for usury in a certain agreement, notice to produce the agreement was served on the defendant's attorney, but the witness who was called at the trial to prove the service of the notice could only speak to having delivered a certain paper to the defendant's attorney, the contents of which he did not know ; and the production of the paper having been demanded in Court and refused, it was proposed on the part of the plaintiff to call the defendant's attorney, then in Court, as a witness, to prove the contents of the paper with which he had been served, in order to substantiate the notice to produce the original agreement, and to let the plaintiff into parol evidence of it, if not produced. Lord *Ellenborough*, however, at the trial at the sitting after last *Michaelmas* term at *Westminster*, on objection taken, inclined to think that the defendant's attorney was not bound to disclose the contents of the paper, which he had become acquainted with in his confidential character of attorney ; and the plaintiff was thereupon nonsuited. A rule *nisi* was obtained in the last term for setting aside the nonsuit and having a new trial, on the ground that the contents of the notice with which the attorney had been served by the adverse party, not being a fact communicated to him by his own client, there could be no breach of confidence in his declaring it.

Garro, *Reader* and *Dillon*, now shewed cause. It is in vain to say, that the defendant's attorney was not bound to produce the notice in Court, (which was admitted) if he were compellable to supply the defect of the plaintiff's evidence by giving testimony himself as to the contents of it. This was a communication made to him *as attorney* for the defendant *in the cause*, which he is restrained by the privilege of his client from disclosing. The privilege identifies the attorney with his client as to all matters which he knows only in his character of attorney ; and all papers delivered to him by the adverse party as attorney become the documents and property of his client, and he cannot disclose the contents of any such from whatever quarter derived.

Sir. *V. Gibbs* and *Burrough*, contra, were stopped by

Lord ELLENBOROUGH, C. J. ; who said, that he had great doubt at the time he rejected the witness, and was afterwards satisfied that he had acted hastily. That the privilege was restricted to communications, whether oral or written, from the client to his attorney, and could not extend to adverse proceedings communicated to him as attorney in the cause from the opposite party, in the disclosure of which there could be no breach of confidence. Here the attorney did not even acquire his knowledge of the contents of the paper from his client, even if that would have made a difference, which might be questioned, but he received the paper himself : and his privilege of attorney only extends to confidential communications from his client, and not to communications from collateral quarters, although made to him in consequence of his character of attorney.(1)(2)

Per Curiam,

Rule absolute.

(1) Among the minor titles of the law there is scarcely an instance where the cases are more uniformly governed by the principle to which they are referred, than that which relates to the privilege arising from professional confidence. The principle alluded to is, 'That a client shall be protected in confidential communications made to his

attorney, solicitor or counsel. This principle can have an application only where the relation of client and attorney, &c. subsisted at the time, and as to the subject matter, of the communications; and the facts in question were acquired by the attorney, &c. through the confidence of the client.

1. The client shall be protected. It is his privilege, and not that of the attorney. *Lord Say and Sele's case*, 10 Mod. 41. *Lindsay v. Talbot*, Bull. N. P. 284. *Wilson v. Rastall*, 4 Term Rep. 759, per *Buller*, J. Mac Nal. 242. *Baker v. Arnold*, 1 Caines 266. 272. *Swift's Ev.* 94.

2. The relation of client and attorney, &c. must subsist at the time of the communications. First, where this relation does not subsist at all, no degree of confidence will entitle the party to the privilege. As in the *Dutchess of Kingston's case*, 11 State Trials, 248, where the witness objected to answer the question put to him, upon the ground that the fact came to his knowledge from his being employed by the Dutchess as a surgeon; but the Lords overruled the objection, and the witness was examined. So where a prisoner being a papist had made a confession before a clergyman of the crime for which he was indicted, that confession was permitted to be given in evidence on the trial. *The King v. Sparkes*, coram *Buller*, J. on the Northern Circuit, cited *Peake's Ca.* 77. So where the witness was an attorney, and said the matter in question came to his knowledge in consequence of the defendant's consulting him professionally, but it appearing from the whole evidence that he was not in the situation which he assumed to himself, it was held that he ought to testify. *Wilson v. Rastall*, 4 Term Rep. 753. So it had been repeatedly held, that communications made to a friend in confidence are not entitled to the privilege. See the examination of *Lord Barrington* in the *Dutchess of Kingston's case*, 11 State Trials, 246. *Hoffman & al. v. Smith*, 1 Caines 157. *Holmes v. Comegys*, 1 Dal. 439. *Morris's Lessee v. Vanderen*, 1 Dal. 66. *Mills v. Griswold*, 1 Root 383. *Sherman v. Sherman*, 1 Root 486. *Calkins v. Lee*, 2 Root 363. In *Wilson v. Rastall*, 4 Term Rep. 758, *Lord Kenyon* said, "If a friend could not reveal what was imparted to him in confidence, what is to become of many cases, even affecting life? (e. g. *Doctor Ratcliffe's case*, 9 State Trials 552.) And if the privilege now claimed extended to all cases and persons, *Lord W. Russell* died by the hands of an assassin, and not by the hands of the law; for his friend *Lord Howard* was permitted to give evidence of confidential conversations between them." 3 State Trials, 715."

Secondly, the relation must subsist at the time the communications are made, and with reference to the subject matter. As where a client, after a writ of enquiry executed upon an interlocutory judgment, and a compromise between the parties, told his attorney, by way of exultation, that he had obtained more than he was entitled to; it was held in a subsequent action to recover back the money so paid, that the attorney was an admissible witness to prove the conversation. *Cobden v. Kendrick*, 4 Term Rep. 431. So an attorney, &c. may be called to prove a fact which he knew before his retainer. Bul. N. P. 284. So where an attorney had been retained generally by the *Earl of Anglesey* for twenty years, he was permitted to give in evidence a conversation with that nobleman during this period, which did not relate to any cause in which the attorney was concerned, or consulted, or intended to be employed. *Annasley v. The Earl of Anglesey*, cited M'Nal. 241. It has been decided that this relation may be formed before the commencement of any suit. *Gainsford v. Grammar*, 2 Campb. 9. But where the communications are so made as to come within the rule, the attorney, &c. will not be permitted to disclose them at any future time, even though the client is not then before the court. *Du Barre v. Livette*, *Peake's Ca.* 77. *Wright v. Mayor*, 6 Ves. jun. 280. *Rex v. Withers & al.* 2 Campb. 578. *Wilson v. Rastall*, 4 Term Rep. 760, per *Buller*, J. *Lynde v. Judd*, 3 Day, 499. A fortiori where the client is virtually a party, though not the party on record, the attorney is precluded from testifying. *Soman v. Herne*, 2 Esp. 695.

3. The facts must have been acquired by the attorney, &c. through the confidence of the client; for as to such facts as were not so acquired, the attorney stands on the same ground as any other person. As if an attorney were present when his client was sworn to an answer in chancery, upon an indictment for perjury, he would be a witness to prove the fact of taking the oath; for it is a fact in his own knowledge, and was not confided to him by his client. Bul. N. P. 284. In *Doe d. Jupp v. Andrews*, Cowp. 846, *Lord Mansfield* said, "An attorney has no privilege to refuse to give evidence of collateral facts. I have known an attorney obliged to prove his clients' having sworn and signed the answer upon which he was indicted for perjury." So if the question were about a rasure in a deed or will, the attorney might be examined to the question whether he ever saw such deed or will in a different plight; for that is a fact of his own knowledge. *Lord Say and Sele's case*, cited Bul. N. P. 284, S. C. reported 10 Mod. 40. So where to an action of debt on bond, the defendant pleaded usury, and to prove it called the plaintiff's attorney, who had prepared the bond and the mortgage which accompanied it; this was objected to as a case of confidence; but *Lord Kenyon* ruled that it was not within the rule, in as much as the fact did not come to his knowledge by communication from his client. *Duffen v. Smith*, *Peake's Ca.* 108. In *Sanford v. Remington*, 2 Ves. junr. 189, the Lord Chancellor held that an attorney might be called on

Orr and Others v. Maginnis.

7 East, 359. April 26, 1806.

It seems that proof of a protest for non-acceptance of a foreign bill of exchange is necessary to enable the payee to recover against the drawer, and that the want of it is not supplied by proof of a noting for non-acceptance and a subsequent protest for non-payment. But whether or not the protest for non-payment be sufficient in such case, where the holder, after a refusal by the drawee to accept, presented it for payment when due, and was refused payment; at any rate the holder is bound to give notice to the drawer of the non-acceptance; without which the original payee, to whom the bill was returned, cannot recover against the drawer: and it is no excuse for not giving such notice that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn.

THIS was an action by the payees against the drawer of a bill of exchange, drawn by him at *Demerara*, on the 25th of *January* 1802, upon Messrs. *Mullian, Lennox, and Co. of Liverpool*, for 17*l.* 1*s.* 1*d.* payable at 90 days sight to the plaintiffs, or order; which bill the declaration alleged to have been duly presented to *Mullian and Co.* for acceptance, on the 19th of *July* 1802, and refused to be accepted, and afterwards when it became due and payable on the 22d of *October* 1802, was also presented for payment, and refused to be paid; and thereupon the said bill was in due form of law protested for non-payment thereof: of which premises the defendant had notice. And then it averred, that at the time of making of the said bill, and from thence until and at the time when the same was so presented to *M. and Co.* for payment, *M. and Co.* had not any effects in their hands of the defendant's by means of which premises the defendant became liable to pay to the plaintiffs the sum in the bill specified, together with interest, damages, and charges thereon, amounting to 27*l.* 1*s.* 1*d.* when requested, and being so liable, promised to pay, &c. There were also the common money counts. Plea, *non assumpsit*.

At the trial before Lord *Ellenborough*, C. J. at the sittings after last term at *Guildhall*, it appeared that the bill in question had been drawn by *Maginnis*, the captain of a ship engaged in the *African* trade, on *Mullian and Co.* for the amount of stores furnished to the ship at *Demerara*. That at the time of the bill drawn the defendant had effects (but to what amount did not appear) in

to disclose acts done in his presence by his client, at the execution of a deed; though he could not disclose the private conversation as to the deed, the reasons for making it, &c. So if an attorney, in the course of a cause, interrogate a witness as to his knowledge of certain facts, and such witness, on being called in another cause, give a different account from that formerly related by him to the attorney, the adverse party may call the attorney to discredit the witness, by proving the relation made to him on such examination. *Berkey's* evidence in the *Dutchess of Kingston's* case, 11 State Trials 243, & seq. So if an attorney attests an instrument as a witness, he may be examined as any other attesting witness. In *Doe d. Jupp v. Andrews*, Cowp. 846, Lord *Mansfield* said, "By attesting an instrument, a man pledges himself to give evidence of it whenever he is called upon. His being attorney on the other side is no reason for his breaking his engagement with the plaintiff." In *Robson & al. v. Kemp*, 5 Esp. 52, Lord *Ellenborough* said, "If an attorney puts his name to an instrument as a witness he makes himself thereby a public man, and no longer clothed with the character of an attorney: his signature binds him to disclose all that passed at the time respecting the execution of the instrument."

But where the attorney is not an attesting witness, the question whether he may be called upon to prove the execution, condition, contents, or destruction of an instrument, will depend upon the circumstances of the case, governed by the principles before laid down; and a slight variation of circumstances may sometimes vary the result. See Lord *Say and Sele's* case, 10 Mod. 40. *Rex v. Dixon*, 3 Barr. 1687. *Duffen v. Smith*, Peake's Ca. 108. *Robson v. Kemp*, 4 Esp. 235. 8. C. 5 Esp. 52. *Brard v. Ackerman*, 5 Esp. 119. *Spenceley v. Schulenburg*, in the text. *Baker v. Arnold*, 1 Caines, 268. *Lynde v. Judd*, 3 Day 499.

(2) [See all the cases, English and American, collected, in 2d Stark. Ev. 7th Amer. ed. p. 320 & seq.—W.]

the hands of the drawees, but in *May* 1802, his whole balance, amounting then to 116*l.*, was paid to him by them, having then no notice of this bill; and in *July*, when the bill was presented for acceptance, and up to the 22*d* of *October*, when it was presented for payment and refused, the drawees had no effects of the drawer in their hands. The bill was *noted*, but *not protested for non-acceptance*; but when refused payment in *October*, was regularly protested for non-payment: but no notice was given to the drawer of the non-acceptance, he not being then to be found, and having no settled place of residence: but at that time the bill was in the hands of one of the subsequent indorsees to whom it had been negociated, after having been indorsed and passed off by the plaintiffs; which indorsee afterwards returned the bill under protest to the plaintiffs, and received from them the amount of it with the expences. The plaintiffs were nonsuited at the trial for want of proving a protest for non-acceptance, and for want of notice to the drawer of non-acceptance.

Taddy now moved to set aside the nonsuit and have a new trial, and contended, first, that a *protest* for non-acceptance was not necessary: and here it was noted for non-acceptance, and afterwards protested for non-payment; which is sufficient.

[*Lord Ellenborough*, C. J. It has been expressly decided, that a protest for non-acceptance of a foreign bill of exchange is necessary to be proved.(a)] In *Goostrey v. Mead*, at Westm. 1751, Bull. N. P. 271, it was considered that the noting should be at the time, yet that the protest might be drawn up at any time afterwards: and it was competent to the party to wait till the time of payment came, and on the drawee's refusal to pay, to protest altogether for non-payment. [*Lord Ellenborough*, C. J. But here there was not only no protest for non-acceptance, but no notice of it to the drawer.] 2*dly*, Notice of non-acceptance was not necessary, because it appeared that the drawer had no effects in the hands of the drawees, either at the time when the bill was presented for acceptance and refused, or at any time afterwards; and that according to *Bickerdike v. Bollman*, 1 Term Rep. 405; *Goodall v. Dolley*, 1 Term Rep. 714, per *Buller*, J. and *Rogers v. Stephens*, 2 Term Rep. 713, supersedes the necessity of notice, and consequently of protest. And it cannot make any difference that the drawer had some effects in the drawee's hands when the bill was drawn, as he withdrew them afterwards before the bill could be presented, of which he must have been apprised, and therefore could receive no injury from the want of notice. And at any rate, the want of notice ought not to affect the plaintiffs, who had not the bill in their hands at the time of the dishonour.

Lord ELLENBOROUGH, C. J. The case of *Bickerdike v. Bollman* went on the ground that the drawer had no effects in the hands of the drawee *at the time of the bill drawn*, and the other cases followed on the same ground: but no case has gone the length of extending the exemption further, to cases where the drawee had effects of the drawer in his hands at the time of the bill drawn, though the balance might vary afterwards, and be turned into the opposite scale; and I know that it has been a subject of regret with the very learned person who was counsel for the plaintiff(b) in that case, that the old rule requiring notice to be given in all cases to the drawer of the non-acceptance of his bill was so far broken in upon. But I shall anxiously resist the further extension of the exemption. The case is different when there are no effects of the drawer in the hands of the drawee at the time, because the drawer must know that he is drawing on accommodation: but if he have effects at the time,

(a) This was decided in *Gale v. Walsh*, 5 Term Rep. 239, and vide *Rogers v. Stephens*, 2 Term Rep. 714; in which latter case there was a subsequent protest for non-payment; but the case was decided principally on the ground that the drawer had no effects in the hands of the drawee at the time.

(b) The present Mr. Justice *Chambre*. [It was afterwards said, that the person here alluded to was the present Lord *Eldon*. Vide 12 East, 173, n. (d).]

it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary; it would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn, down to the time it was dishonoured.(1) The holder is not bound to present it for acceptance till due: but if he do, and it be refused acceptance, he is bound to give notice to the drawer, in order that he may take the necessary measures to withdraw his effects, if they continue in the drawee's hands.

Per Curiam,

Rule refused.(2)

Roe, on the Demise of West, v. Davis.

7 East, 363. April 26, 1806.

In ejectment upon a clause of Re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of Re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce: held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. The Court will not, after a trial, stay the proceedings on payment of the rent, &c. the stat. 4 G. 2. c. 28, only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises.

THIS was an ejectment brought upon the forfeiture of a lease (according to a proviso therein) for non-payment of rent. At the trial before *Lawrence, J. at Gloucester*, the plaintiff, not having given notice to the defendant to produce the original lease, produced the counterpart the execution of which he proved by the subscribing witness. It was objected, that the lease itself ought to have been produced, or notice given to the defendant to produce it, without which the counterpart executed only by the lessee was not legal evidence of the lease, and of the proviso for re-entry in default of payment of rent. And this case was endeavoured to be distinguished from *Burleigh v. Stibbs*, 5 Term Rep. 466, where the part of an indenture executed by the master, wherein it was recited that *A. B.* had put himself apprentice to him, was holden to be evidence of such a binding in debt against the master for a penalty on the st. 8 Ann. c. 9, for not inserting the true consideration in the indenture. But this is attempted to be made evidence against a third person, no party to the instrument. 2dly, It was objected at the trial, that the demand of the rent had been made by the witness, who told the defendant that he had a power of attorney from the lessor of the plaintiff for that purpose, but though it appeared that the witness had such a power of attorney with him at the time, yet it was not produced to the defendant, which it ought regularly to have been;

(1) The doctrine here laid down has since been recognized by Lord *Ellenborough* in a case under similar circumstances. *Blackhan v. Doren*, 2 Campb. 503. As to the general doctrine that where the drawer has no effects in the hands of the drawee, notice may be dispensed with, see *Bickerdike v. Bollman*, 1 Term Rep. 405. *Rogers v. Stevens*, 2 Term Rep. 713. *Walsby v. St. Quintin*, 1 Bos. & Pull. 655. *Legge v. Thorpe*, 12 East, 171. 8 C. at Nisi Prius, 2 Campb. 310. *Hoffman & al. v. Smith*, 1 Caines 157. *Fotheringham v. Price*, 1 Bay 298. *Clegg v. Cotton*, 3 Bos. & Pull. 242. *Staples v. Okines*, 1 Esp. 333. *Dennis v. Morris*, 3 Esp. 158. *Gale v. Walsh*, 5 Term Rep. 239. *Boulanger v. Talleyrand*, 2 Esp. 551.

(2) [See acc. *Blackhan v. Doren*, 2 Camp. 503. *Hammond v. Dufrene*, 3 do. 145. *Thackray v. Blackett*, 3 do. 164. *Dickins v. Beale*, 10 Peters, 572. *Bloodgood v. Hawthorn*, 9 Louis. 124. *Baker v. Gallagher*, 1 W. C. C. R. 461. *Kinsley v. Robinson*, 21 Pick. 327. *Cushing v. Gore*, 15 Mass. 60. But an endorser, in case of there being no funds of the drawer in the drawee's hands at the time of drawing the bill, is still entitled to notice. *Warder v. Tucker*, 7 Mass. 449. *Ramdullday v. Daricuz*, 4 W. C. C. R. 61.—W.]

especially to induce a forfeiture; for otherwise the defendant might not be assured that he had the authority he assumed to have. These objections were over-ruled at the trial, and the plaintiff recovered a verdict; which

Abbott now moved to set aside and to enter a nonsuit; and stated the same objections again.

Lord ELLENBOROUGH, C. J. as to the first ground. The acknowledgment of the original lessee (from whom the defendant claims) under his seal, that he held these premises under his landlord, upon the conditions and covenants therein expressed, was sufficient evidence of the holding upon such terms against one holding under the lease. And upon the second ground; It was necessary that the person who demanded the rent should be clothed with a proper authority to do so, and that he should notify it to the tenant; and it appears that he had such an authority, and that he did notify it to the tenant, and that he had a present power of satisfying him of the truth of it; but if the tenant were satisfied without the production of the power of attorney, it was not necessary to produce it.

The other Judges concurred in refusing the rule.

Abbott afterwards obtained a rule, calling upon the lessor of the plaintiff to shew cause why it should not be referred to the master to compute what was due for rent, and why, upon payment of the sum so found due, together with the costs of the ejectment and of this application, the proceedings should not be stayed.

Wigley opposed it upon the ground that the st. 4 Geo. 2. c. 28, only admits of such an application *before* trial, to avoid the expence and delay of a trial; but not where the landlord has been driven to trial, as in this case.

Abbott, in support of the rule, said, that before that statute the Court exercised a discretionary power in these cases of staying proceedings any time before execution executed, which power the legislature did not mean to take away, but only made it compulsory on the Court to exercise it, if the tenant applied before trial. The cases of *Downes v. Turner*, Salk. 597; *Phillips v. Dolittle*, 8 Mod. 345, and *Smith v. Parkes*, 10 Mod. 383, were before the statute; and probably so was *Goodtitle v. Holdfast*, 2 Stra. 900, E. 4. G. 2, no mention being there made of the statute. Here, indeed, there was a trial, but that was because the ejectment was brought for another breach of covenant, as well as for non-payment of rent.^(a) [*Le Blanc*, J. It was still competent for you to have applied to the court before trial upon the breach for non-payment of rent.] He then admitted that he had not been able to find any case since the statute where such an application had been granted *after* trial: but he said it would be more prejudicial to the landlord to drive the tenant into equity. And finding the Court against him upon the wording of the statute, he objected that the statute only applied to cases of ejectment brought after half a year's rent due, *where no sufficient distress was to be found upon the premises*.

Lord ELLENBOROUGH, C. J. The statute is more general in its operations; for though the 4th clause has the word *such* (such ejectment,) yet the second clause to which it refers is in the disjunctive; stating first, that in *all* cases between landlord and tenant, when half a year's rent shall be in arrear, and the landlord has a right of re-entry for non-payment thereof, he may bring ejectment, &c. *or* in case the same cannot be legally served, &c. *or* in case such ejectment shall not be for the recovery of any messuage, &c. and in case of judgment against the casual ejector, or nonsuit for not confessing lease, entry, and ouster, it shall appear by affidavit, or be proved upon the trial, in case the defendant appears, that half a year's rent was due before the declaration served, and that no sufficient distress was to be found on the premi-

(a) The plaintiff at the trial only went on the breach of the covenant by non-payment of rent, on proof of a demand of rent and non-payment. And vide *Pure d. Withers v. Sturdy*, H. 1752, Bul. N. P. 97.

ses, and that the lessor had power to re-enter; then, and in every such case, the lessor in ejectment shall recover judgment and execution, &c. It may perhaps be true, that before the statute a practice obtained in this Court of relieving the tenant up to the extent contended for; but it appears by the words of the act, that the legislature only meant to legalize that practice to a certain extent, namely, upon the application of the tenant *before* trial. If therefore we were now to extend the same relief to him *after* trial, we should be exercising the function of legislation instead of judicial construction, and should depart from the line which the statute has drawn.

Per Curiam,

Rule discharged.(a)

Dawson and Another v. Atty.

7 East, 367. April 26, 1806.

Goods insured on board a certain ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed, though the broker had before said she was an *American*, when the slip was subscribed, and though she were in fact an *American*, need not be documented as such: and therefore in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters.

THIS was an action on a policy of insurance, made in general terms "on goods on board the ship called the *Hermon*," at and from *Liverpool* to *Messina* and *Naples*, for a premium of eight guineas per cent; whereon the plaintiff declared as upon a loss by capture. At the trial after last term at *Guildhall*, before Lord *Ellenborough*, C. J. it appeared in evidence, that on a former occasion, when the slip was subscribed, the ship was described by the broker as an *American*, but nothing of this sort was represented at the time when the policy was subscribed, but merely that it was an insurance on goods in the *Hermon*. The ship was in fact an *American*, but had no certificate of having on board no contraband of war, as required by the treaty between the United States and *Spain*; and being captured in the course of her voyage by the *Spaniards*, was condemned as prize for want of being properly documented according to the treaty. His lordship, however, thought that the want of the proper document was immaterial, as the ship was neither insured as *American*, nor represented as such at the time of the insurance effected; and therefore the plaintiff recovered a verdict.

Garrow now moved for a new trial, on the ground that the ship, being in fact an *American*, ought to have been properly documented as such, which she was proved not to have been: and *Christie v. Secretan*,(b) was referred to.

LORD ELLENBOROUGH, C. J. now again said, that as the ship was not represented to be *American* at the time when the insurance was effected, the assured was not bound by it; and there being no undertaking in the policy itself that she was an *American*, there was no necessity for her being documented as such. And, the other Judges concurring,

Refused the rule.

(a) Vide Anon. Salk. 287, which cites *Combe v. Mayo*, in Lord *Hale's* time.

(b) 8 Term Rep. 192. There the policy was on goods on board the ship "*The Peggy, of George Town*," on a voyage from *Maryland* and *Virginia* to *Bremen*, and the broker, at the time of effecting the insurance, spoke of the ship as an *American* ship, but told the underwriters that he was directed not to warrant any thing.

The Company of Proprietors of the Wyrley and Essington Canal Navigation v. Bradley and Others.

7 East, 368. April 26, 1806.

A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the Company of their intention to work their mines within ten yards of the canal, and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the Company the latter did not purchase out their rights: and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal owner for such injury, which happened by the default of the Company in not purchasing. *Aliter* where the house of one claiming under a grant from the owner of the soil was undermined.

THE plaintiffs declared that they were possessed of a certain close in the parish of *Walsall*, in the county of *Stafford*, and were proprietors and lawfully possessed of and entitled to the use, benefit, and profits of a certain canal, dug and made in, through, and over the said close, and containing water on which boats, &c. were navigated, to the profit of the company. That the defendants were possessed of a coal mine, near to, and under the said close of the company, and near to and under the said canal; yet that the defendants, well knowing the premises, but intending to deprive the company of their profits of the navigation, &c. so wrongfully, negligently, incautiously, and improvidently cut and dug their coal mine, and worked the same so near the said close of the company, and to the sides, banks, and bottom of the canal, and removed such large quantities of coal and soil from out of the said coal mine, and so near to the sides, &c. of the canal, that 300 yards of the sides, banks, and bottom of the canal sunk, gave way, and were damaged and destroyed, and great quantities of water ran out of the canal and were wasted, and the canal was rendered impassible for boats, &c. for six months, and became of no use or benefit to the company, by means of which the company was obliged to expend 500*l.* in repairs, &c. Plea, not guilty.

The stat. 32 Geo. 3. c. 80, for making and maintaining this canal, provides (s. 6.) "That nothing in this act contained shall entitle the company, on purchasing any lands for making the canal, to any mines of coal, &c. which shall be found in cutting, or shall be under the same, but that all such mines shall belong to such persons as would have been entitled to the same in case this act had not been made. Sections, 58, 59, 60, and 61, specify the method to be observed in working the mines within 10 yards distance of the canal: and in particular, s. 61, enacts, "that when and as often as the owner of any mine of coal, &c. lying under or within the distance before limited from the said canal, shall be desirous of working the same, such owner shall give notice in writing under his hand of such intention to the clerk of the company, at least three calendar months before he shall begin to work such mine; and upon the receipt of such notice it shall be lawful for the company to inspect such mine, in order to determine what coal, &c. may be gotten without prejudice or damage to the canal: and if the company shall refuse or neglect to inspect such mine, within 34 days after notice, it shall be lawful for the owner of such mine, and he is hereby authorized to work such part of the said mine as lies under the canal, or within the distance aforesaid: and if upon such inspection as aforesaid the company shall refuse to permit the owner of such mine to work such part thereof as lies under the said canal, or within the said distance, as they might have gotten, or in any other manner

obstruct or prevent such owner from getting the same, then the company shall, within three calendar months after such refusal or obstruction, pay to such owner such price for the same as the next adjoining mines shall have been sold for or valued at: and if any dispute shall arise between the company and any such owner touching the same, it shall be settled by commissioners," &c.

At the trial before *Lawrence, J.* at the last *Stafford* assizes, it appeared in evidence that the defendants, before they began to work their mine within the given distance of the canal, had given notice of their intention to the company, who, after sending persons to examine the same, declined purchasing out the defendants' rights, and left them to go on with their works; in consequence of which the defendants continued working on the mine in the usual way, till the damage happened by a partial giving way of the sides and bottom of the canal. But the learned Judge, being of opinion upon the construction of the act of parliament, that the legislature had left to the owners of the lands the entire dominion and benefit of their property in every respect not otherwise expressly provided for, and that the defendants had done every thing which they were required to do by the act, and that it was the company's own fault if upon the notice received they did not choose to purchase out the defendants' rights, he nonsuited the plaintiffs.

Damney now moved to set aside the nonsuit, and have a new trial, on the ground that the defendants were bound so to use their own as not to injure the plaintiffs' property. That the 61st section did not authorize the owners of mines near the canal to work at all hazards, though the company refused to purchase, but only left them, as in other cases, to work at their own discretion and peril. And he mentioned a case which some time before had been tried before the same learned Judge, between the *Birmingham* canal company and *Hawkesford* and others, where, under similar circumstances, though upon a different act of parliament(a), that company had obtained a verdict. And he also referred to a case some years ago, where the owner of a house near *Newcastle*, which was undermined by a colliery of the late Lord *Lonsdale*, and fell down in consequence of it, recovered damages against him.

LAWRENCE, J. said he had no distinct recollection of the former case before him; but if the act of parliament in that case were not very differently framed from the present, he thought his former opinion not so well founded as in the present case. And

All the Court, after consultation, were now of opinion, that the meaning of the act of parliament in requiring the coal owners to give notice to the company of their intention to work their mines within a certain distance of the canal, and the liberty given to the company to inspect the works, and to prohibit the owners, upon making compensation to them, from working within that distance, was for the purpose of enabling the company to purchase out the rights of the coal owners, if they thought their canal works likely to be endangered by the nearer approach of the miners: but if the company declined the purchase, as they had done in this case, the coal owners were left to their common law rights, as if no canal had been made, and they might take every part of their coal in the same manner as they might have done before the act passed: their former rights in that respect not having been taken away by the act; which had only appropriated the surface of the land and so much of the soil as was necessary for the cutting and making of the canal, leaving the coal, &c. to the owners, to be enjoyed in the same manner as before: and the legis-

(a) The clause in the *Birmingham* Canal act, 23 G. 3. c. 92. s. 99, touching the manner of working the adjoining mines, is materially different from the clause in question. After providing that nothing in the act shall extend to defeat, prejudice, and affect the rights of any lords of manors, commons, or waste grounds, or the owners of any lands, &c. through which the canal shall be cut, to the mines, &c. lying within or under the same, but that all such mines are reserved to such lords and owners to work the same, &c. there follows "provided that in working such mines, &c. no injury be done to the said navigation."

lature had only given the land owners a compensation for so much of the soil as they had deprived them of. And this they said was not like the case where damages were recovered against the late Earl of *Lonsdale*, for undermining a person's house; for there the party claimed under a grant from the owner of the land, and the injury done was against the land owner's own grant.

Rule refused.

The King v. The Inhabitants of Rickinghall Inferior.(a)

7 East, 373. April 30, 1806.

A pauper placed by the parish with a parishioner, upon an agreement between the latter and the parish officers, to find board, washing, and lodging for the pauper at 2s. 6d. per week, and that the pauper was to do what he was set about, does not constitute the relation of master and servant between such parishioner and the pauper so as to enable the latter to gain a settlement as by hiring and service. Neither does such relation arise by implication from a continuance of services by the pauper to the parishioner; living with him as before, after the parish had refused any longer to continue the parochial allowance; and the pauper, who was a *Greenwich* pensioner, going there twice a year without asking or receiving the leave of the parishioner; the latter, however, not refusing leave when informed of the other's going.

TWO justices by an order removed *Henry Saunders*, his wife, and daughter, by name, from the parish of *Rickinghall Superior* to that of *Rickinghall Inferior*, both in the county of *Suffolk*; which order was confirmed by the Sessions on appeal, subject to the opinion of this Court on the following case:

The pauper *H. Saunders*, a *Greenwich* pensioner, settled in the parish of *Redgrave*, came there in the year 1801, disabled by the loss of a leg. On the 5th of *March* in that year, the parish officers of *Redgrave* agreed verbally with *Robert Crowe* of *Rickinghall Inferior*, limeburner, that *H. Saunders* should live with him till the 8th of *November* following, and do for him whatever he set him about. The parish of *Redgrave*, agreed to pay *Crowe* 2s. 6d. per week, and *Crowe* to find board, lodging, and washing for *Saunders*. Under these terms *Saunders* lived with *Crowe* till *Christmas* following, when *Crowe* went with *Saunders* to the parish officers of *Redgrave*, and refused to keep him any longer unless they would increase the allowance. They consented to increase it to 4s. per week; and *Crowe* thereupon agreed to take *Saunders* again till the *Easter* following. *Saunders* returned and staid accordingly in the same manner. At *Easter* the parish of *Redgrave* refused to continue *Saunders* upon an allowance, and thereupon *Crowe* sent him home to *Redgrave*, whence he returned to *Crowe*; and, without any new express agreement, continued to live with him in the same manner as before until *October* 15th, 1804, when he ceased to live with *Crowe* on account of his marrying. During the time that *Saunders* lived under the first agreement with the officers of *Redgrave* he attempted to absent himself from *Crowe* to make holiday; but *Crowe* told him he was his servant by the agreement with the parish, and that he could not go without his leave; which however he did. He went twice in the year to *London* to get his pension from *Greenwich Hospital*, and was absent about two or three weeks at a time. He used to tell *Crowe* when he was going; but he did not ask leave, nor did *Crowe* refuse. During the whole time *Saunders* lived with *Crowe* he was employed by him in chopping chalk. He did no work for any other person. He slept in the parish of *Rickinghall Inferior*, and received now and then sixpence from *Crowe* when he did little jobs for him on *Sundays*; and has done nothing since to gain a settlement. While *Saunders* was with *Crowe*, after the parish officers of *Redgrave* had refused to continue the allowance, he received from them, on his application

(a) I was not in court when the case was called on; but I collected afterwards the substance of what passed.

for relief, at one time half-a-guinea, and at another half-a-crown; and once the parish officers at *Redgrave* took for themselves his pension from *Greenwich Hospital*. The Sessions, besides confirming the order of removal, ordered the appellants to pay to the respondents the common costs of forty shillings, considering the statute of the 8th and 9th W. 3, imperative on them in that respect.

Frere, in support of the order of Sessions, proposed to consider, 1st, if the relation of master and servant existed between the pauper and *Crowe*; 2dly, if the pauper's absenting himself during the service prevented the settlement; 3dly, if the magistrates were obliged to give costs. Upon the latter the Court gave no opinion; and upon the first, finding the opinion of the Court strongly against him, as to the agreement between the parish officers and *Crowe*, he relied principally upon the service of the pauper with *Crowe*, from whence a general hiring was to be implied, after the parish officers had ceased to pay *Crowe*. But

The Court (Lord *Ellenborough*, C. J. absent) were clearly of opinion that no settlement was gained. The relation of master and servant never existed between *Saunders* and *Crowe*. The former was placed with *Crowe* by the parish officers, as a pauper, to be maintained by him; and the parish officers had no authority to hire *Saunders* out to the other. And after the parish allowance for *Saunders* was withdrawn from *Crowe*, the latter permitted *Saunders* to live with him out of charity, without any contract as between master and servant.

Alderson, who was to have argued against the orders, was not heard.

Orders quashed.

Ex parte Gill.

7 East, 376. May 2, 1806.

Where, upon a *habeas corpus* to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 G. 2. c. 19, for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself when an infant to serve till 25, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below; who, if the matter shewn to them were true, acted at their own peril in committing the party; but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party.

ESPINASSE moved yesterday for a writ of *habeas corpus* to bring up this person, an apprentice, who had bound himself at the age of 18 years to serve till 25, and who, after he was 21 years of age, had been committed to the House of Correction upon a conviction before two magistrates, founded on the stat. 20 Geo. 2. c. 19, at the suit of his master, for a misdemeanor in absenting himself from his service; *Gill* having insisted before the magistrates that the indentures which had been executed by him when an infant, were not binding upon him after he came of age, but that he might elect to avoid them, as he had done, before the offence alleged. And he cited the case *Ex parte Davis*, 5 Term Rep. 715, as in point. And now the return to the writ made by the keeper of the House of Correction was produced; which set forth a regular conviction of this party under the statute for a misdemeanor in absenting himself from his master's service and refusing to obey him, wherein nothing appeared of the objection arising from the age of the party. Whereupon, after hearing *Espinasse* on his behalf,

The Court said that they could do no otherwise than remand the party; for it appeared by the return that he was committed in execution upon a regular

conviction; and that however the circumstances now laid before the Court by affidavit might, if well founded, be matter of defence against the charge before the magistrates, they could not be examined by the Court now. That if the defence had been properly made before the magistrates, and they had disregarded it, the party had a remedy against them; but that this Court had no authority to direct that the apprentice should be discharged from his indentures; and that there was a mistake in that respect in the report of *Davis's* case; the judgment of the Court there being that the apprentice should be discharged out of the custody of her master, in whose custody she was when brought up before the Court.

The party was remanded.

The King v. The Inhabitants of Binegar.

7 East, 377. May 7, 1806.

An order of removal of *J. S. and B. his wife*, made upon the examination of the wife, adjudging that they lately came into the parish of *K.* and are likely to become chargeable to it, and were last legally settled in *M.*, is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. S., singlewoman*, from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void.

ON the appeal by the parish officers of *Binegar*, in the county of *Somerset*, against an order of two justices for the removal of *Elizabeth Savage*, otherwise *Walters*, by the name of *Elizabeth Walters*, singlewoman, from the parish of *Midsomer Norton*, in the said county, to the parish of *Binegar*, the order of removal was affirmed by the sessions, subject to the opinion of this Court on the following case:

On the 25th of April 1793, by an order of two justices made on the complaint of the parish officers of *Kilnersdon*, it was complained and adjudged in the following words, viz. "That *John Savage*, labourer, and *Betty his wife* (the said *Betty* being the pauper above removed,) lately came and intruded themselves into the said parish of *Kilnersdon*, endeavouring there to settle as inhabitants thereof, contrary to law, not having any way acquired a legal settlement therein, and are likely to become chargeable thereto, we do, upon due examination, adjudge the said complaint and premises to be true: and we do further, upon the examination of the said *Betty*, the wife of the said *John Savage*, taken upon her oath, adjudge that the said *John Savage*, and *Betty* his wife, were last legally settled in the said parish of *Midsomer Norton*." And the said *Betty* was removed from *Kilnersdon* to *Midsomer Norton*; but against this order of removal there was no appeal. On the 20th of July 1799, by another order of two justices made on the complaint of the parish officers of *Wellow*, in the said county, it was complained and adjudged in the following words; viz. "That *Elizabeth Savage* (being the said pauper) lately came to inhabit in the said parish of *Wellow*, contrary to law, not having any ways gained a legal settlement there, &c.; and that the said *Elizabeth Savage* is actually become chargeable to the said parish of *Wellow*; we the said justices, upon due examination of the said complaint and premises, and also upon examination of the said *Elizabeth Savage*, upon her oath before us, and upon due consideration by us had in the premises, do adjudge the same complaint and premises to be true: and we do likewise adjudge that the said last lawful settlement of her the said *Elizabeth Savage* is in the said parish of *Midsomer Norton*." And she was therefore removed from *Wellow* to *Midsomer Norton*. And against this order likewise there was no appeal. At Lady-day 1803, the said *Elizabeth* hired herself for a year, at the wages of four guineas, as a dairy maid, to *J. Brooks* of *Binegar*, and served with him in that parish for 16 months. The said *John Savage* is still living. After

Elizabeth left the service of *Brooks* she returned to *Midsomer Norton*, and became chargeable to that parish. In *May* last, *John Savage* was committed to the house of correction for having run away and left the said *Elizabeth*, therein called *his wife*, so chargeable, until the next quarter sessions held for the said county in *July* last, when the charge in the said commitment being duly proved to the sessions, upon oath, in the presence of the said *John Savage*, to be true, the Court adjudged *Savage* to be a rogue and vagabond, and a male upwards of 12 years of age, and ordered him to be detained in the house of correction for three days, and that before he was discharged from thence he should be sent to be employed in his Majesty's service by land, in his Majesty's 40th regiment of foot. But *John Savage* hath never contributed to the maintenance of the said *Elizabeth*. The respondents produced evidence to the Court that a marriage solemnized between the said *John Savage* and the said *Elizabeth*, before either of the said orders of removal were made, was a nullity, and the nullity of such marriage was not disputed.

The question for the opinion of the Court was, whether or not the respondents were estopped either by the former orders of removal, or by the adjudication of the said *John Savage* to be a vagrant, for running away and leaving the said *Betty*, who is in such adjudication considered as *his wife*, from giving any evidence whatever to prove the said marriage a nullity.

Garrow and *Topping* in support of the order of sessions. The second order which removes *Elizabeth Savage*, treating her as a single woman, may be laid out of the case; for it does not necessarily upon the face of the order include the judgment of the justices upon the question of the marriage, and *non constat* that it was in issue before them. And as to the order of vagrancy, it is a mere *ex parte* proceeding, and cannot conclude the fact of marriage. The question then reverts to the validity of the first order of removal: for if that be bad upon the face of it, it cannot conclude the parish: as it must be admitted that it would if good, according to *Rex v. Silchester*, Burr. S. C. 551, and *Rex v. Rudgeley*, 8 Term Rep. 620. Now here the order was illegal on the face of it: 1st, because it is a removal of the husband and wife, stated to be made upon the examination of the wife only, who can only know the fact of her husband's settlement by hearsay from him. [Lord *Ellenborough*, C. J. That does not follow. She may know the fact as well as any other witness.] 2dly, It does not appear that the parties ordered to be removed were within the jurisdiction of the removing magistrates, without which they had no jurisdiction. It is only stated that the paupers *lately* came into the parish of *Kilmersdon*, not that they were *then* in the parish, at the time of the order made. [Lord *Ellenborough*, C. J. The order states, and the magistrates adjudge it to be true, that the paupers *are likely to become chargeable* to the parish, which could not be if they were not in the parish at the time.] 3dly, There is no adjudication of a *present* settlement; only that the paupers *were* last legally settled in *Midsomer Norton*. [Lord *Ellenborough* said, that it referred to the time of the complaint made, and the Court could not intend an intermediate settlement between the hearing of the complaint and the making the order of removal.]

The Court all concurred in quashing the order; considering the first order of removal as good upon the face of it, and, according to *Rex v. Silchester*, conclusive upon the question of the marriage, which was involved in the judgment of the justices.

Orders quashed.

Sir V. *Gibbs* and *Pell* were to have opposed the orders.

The King v. The Inhabitants of Barmby-in-the-Marsh.(a)

7 East, 381. May 7, 1806.

The residence of an apprentice with his grandmother in a different parish from his master on account of illness, though with the consent of the master, is not referable to the apprenticeship, so as to gain him a settlement in such parish.

TWO justices, by an order removed *J. Martindale*, his wife, and children, by name, from the township of *Barmby-in-the-Marsh*, in the East Riding of the county of *York*, to the township of *Selby*, in the West Riding. The sessions on appeal reversed the order, subject to the opinion of this Court on the following case;

The pauper *J. Martindale*, was bound apprentice by indenture dated the 1st of *April* 1794, for four years, to *J. Brealby*, of *Hunslet*, in the west riding, who was the master of a small vessel trading on the river *Ouse*. The pauper slept more than 40 nights during such apprenticeship at *Selby*, at different times, but slept the last night thereof at *Barmby-in-the-Marsh*, at his grandmother's, in which latter place he had before slept more than 40 nights, in consequence of his being ill of a fever. He so went to *Barmby-in-the-Marsh* with the consent of his master, who received him again as his apprentice and he never slept there except as above stated.

Lambe in support of the order of sessions, contended that the pauper was settled at *Barmby-in-the-Marsh*, having slept for more than 40 nights, including the last day of his apprenticeship, in that township with the consent of his master. And the circumstance of his going to his grandmother there on account of illness cannot vary the question; for the apprenticeship still subsisted in point of law, and all the cases go upon the point of the master's consent to the residence in any place for 40 days, which is here expressly found. The case of the *King v. Tickfield*, Burr. S. C. 511, which had been mentioned on a former day,(b) when this case was first called on, as deciding against the settlement in *Barmby*, went on the ground of the indentures having been delivered up, and thereby virtually cancelled before the residence with the pauper's father on account of illness. But he relied on *Rex v. Charles*, Burr. S. C. 707, where the apprentice, having become a cripple, was put by his master to live at his grandmother's, at 1s. 6d. a week, in another parish, where he resided the last 40 days; by which residence he was deemed to be settled there. *Aston*, J. said, that that could not be deemed a casual or accidental residence, and therefore distinguished it from cases of that sort. And this is no more a casual residence than that was.

Topping, contra, was stopped.

The Court were all of opinion that the residence of the pauper in *Barmby-in-the-Marsh*, being on account of his illness, was not a residence as an apprentice: and that the statute 3 W. c. 11, which directs that if any person shall be bound an apprentice and inhabit in any parish, such binding and inhabitation shall be adjudged a good settlement, &c. must be understood of an inhabitation referable in some way to the apprenticeship. But that the residence here with the grandmother was no more referable to the apprenticeship, than if the pauper had resided in hospital or prison.(1)

Order of sessions quashed.

(a) I was not in court when this case was decided, but was furnished with accurate instructions of what passed.

(b) *Rex v. Sutton*, 5 Term Rep. 657, was also then mentioned, which was the case of a servant.

(1) Vide *The King v. Stratford-upon-Avon*, 11 East, 176.

Deshons *v.* Head.

7 East, 383. May 11, 1806.

As by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it.

THIS was a rule calling on the defendant to shew cause why the plea filed in this cause should not be quashed, and why the rule to reply should not be discharged, and the plaintiff be at liberty to sign judgment, &c. The defendant was sued by original upon a bill of exchange, of which he was acceptor, and he pleaded in abatement, with an affidavit verifying the plea, for want of an addition to him in the original writ, without first craving oyer of it.

Lambe shewed cause, and objected that if the plea were a nullity, the plaintiff might have signed judgment as for want of a plea: or if it were ill pleaded, he might have demurred to it: but this he said was a novel application, which the Court would not entertain.

Comyn, in support of the rule, said that the plaintiff having been ruled to reply, there might have been a difficulty in signing judgment as for want of a plea: but that the defendant not having craved oyer of the writ, the court ought not to receive the plea. In 5 Com. Dig. 123. Pleader. P. 2, it is said, that "the defendant shall not plead in abatement of the writ before oyer of it;" and 1 Com. Dig. 42, Abatement, H. 1, *Vanderplank v. Bankes*, 2 Wils. 85, and *Hole v. Finch*, 2 Wils. 395, are to the same effect; which, together with all the other cases on the subject, are collected in Mr. *Serjt. William's* ed. of *Saunders*, 1 vol. 318. n. 3, the result of which is, that at this day no advantage can be taken either of a defective original, or of a variance between it and the declaration; this Court having come to a resolution in *Boats v. Edwards*, Dougl. 272, not to grant oyer of the original writ in future, it having been used for the mere purpose of delay. Then the plaintiff may either demur, as in some of the former cases, or sign judgment as for want of a plea, as in *Murray v. Hubbard*, 3 Bos. and Pull. 395, and *Gray v. Sidneff*, 1 Bos. and Pull. 645, or move to quash the plea, as was done in *Wallace v. The Duchess of Cumberland*, 4 Term Rep. 371, in an analogous case, where the defendant, after craving oyer of a deed, set it out defectively.

Lord ELLENBOROUGH, C. J. (after consulting with the other Judges) said that the embarrassment of the case arose from the prior decision of the Court not to grant oyer of the original writ; after which it seemed incongruous to reject a plea for want of such oyer; and that, if the former decision had been to be considered now for the first time, he did not think he should have concurred in it: but having been acted upon so long, it was now too late to overturn it. The effect, however, of the different decisions was to prevent such a plea from being pleaded; and therefore the Court made the

Rule absolute.

Parker *v.* Gordon.

7 East, 385. May 16, 1806.

Whether or not the fact of putting a letter into the post-office, containing notice of the dishonour of a bill to the drawer, to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer: at any rate if a bill be accepted payable at A.'s who is the acceptor's banker, the party taking such special acceptance, which he is not bound to do, thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill, so as to charge the drawer.

IN an action by the indorsee of an inland bill of exchange against the

drawer, which was tried before Lord *Ellenborough*, C. J. at the last sittings in term, it appeared that the bill had been accepted by the drawee, payable at *Davidson and Company's*, who were his bankers in *London*. That on the day when it became due it was presented for payment by a notary's clerk at the banker's shop, but not till past six o'clock in the evening, after the usual banking hours, when the shop was shut and the clerks gone away. And the only proof of notice to the drawer of this dishonour was by shewing that a letter directed to him, containing such notice, was put into the receiving post-office in Inner Temple Lane. But his lordship was of opinion, that the holder of the bill, by taking this special acceptance for payment of it at the acceptor's bankers's, bound himself to present it for payment at the usual banking hours there: and not having done so, there was no evidence of the bill's having been presented for payment to the acceptor, and dishonoured. But supposing that were otherwise, yet that the mere putting of the letter into the post-office, without further evidence that it reached the hands of the drawer, was not sufficient proof of notice of the dishonour; and therefore he nonsuited the plaintiff.

Marryatt now moved to set aside the nonsuit; and as to the sufficiency of the notice to the drawer of the dishonour, he cited *Saunderson v. Judge*, 2 H. Blac. 509, where the putting a letter to the indorser into the post-office, informing him of the dishonour of the note by the maker, was holden sufficient to charge the indorser.⁽¹⁾ And on the authority of this case, which had not been mentioned at the trial, Lord *Ellenborough*, C. J. said, he saw no objection to granting a rule to shew cause. But this became unnecessary by the opinion of the Court on the other point. On the other ground he contended that whether the bill were accepted payable at a banking-house (which however did not appear upon the face of it; for *Davidson and Co.* were not stated to be bankers on the face of the bill,) or at any other place, could not alter the general law respecting the time for making a demand of payment; which might be done at any reasonable hour of the day, without reference to what are called banking hours, of which the law could not take notice; it being a matter depending altogether on the personal convenience of different bankers; those in the city keeping their houses open for payments till five o'clock, and those at the west end of the town till six in the evening. And in *Leftly v. Mills*, 4 Term Rep. 171, the Court said they could not take notice of what were called banking hours: but seemed to consider that if a demand were made at any reasonable time of the day, it would be sufficient: this therefore was a question for the jury to have decided.

LORD ELLENBOROUGH, C. J. There was no dispute about the facts at the trial; and then I conceive that whether the demand were made within due time or not is a question of law. The question is now brought to this, whether the bill were dishonoured? The person on whom it was drawn accepted it, payable at *Davidson and Company's*, who were his bankers: which was done for the purpose of facilitating the payment of it: and if it were refused payment there on due presentation, it would be a sufficient dishonour of the bill whereon to charge the drawer. But if a party choose to take an acceptance payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly: and if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonour of it; at least not without going a step further, and presenting it for payment to the party himself: otherwise it is fishing for the dishonour of a bill made payable at a banker's, to present it there for payment at a time when it is known in the usual course of business that it cannot be paid.

GROSE, J. declared himself of the same opinion.

LAWRENCE, J. The party might have refused to take the special accept-

⁽¹⁾ Vide *Hartford Bank v. Hart*, 3 Day 492. *Chapman v. Lipscombe & al.*, 1 Johns. 294.

ance; but if he choose to take the acceptance in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours? If this were a sufficient demand for payment, no person would be safe in lodging money at a banker's for the purpose of answering bills made payable there: for if the holder might apply for payment at any time of the day, by making his application at an unusual time, it would insure the dishonour of the bill. But where a bill is accepted in this manner, it must be understood by all parties concerned, that it is to be presented for payment at the banker's within the usual hours of business: and not having been so presented in this case, there was no evidence of the dishonour of it, in order to charge the drawer.

LE BLANC, J. If a party will take an acceptance in this manner, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise the greatest inconveniences to trade would ensue. (1)(2)

Rule refused. (a)

(1) In a late case before the *English Court of Common Pleas*, where the declaration alleged, that a bill of exchange, directed to T. C. was by him accepted payable at F. & Co., No. 6 Church-street, Bermondsey, Southwark, and averred that it was in due manner presented to the said F. & Co. for payment, but was silent as to the place where such presentment was made; it was held to be insufficient to charge the drawer; for consistently with this averment, the bill might have been presented to F. & Co. at any other place. *Ambrose v. Hopwood*, 2 Taun. 61. But in a subsequent case before the House of Lords, this decision was overruled, and a contrary doctrine established. *Huffman v. Ellis*, in error, 3 Taun. —

Where the action is against the acceptor, it has been equally *quæsitio vexata* whether it is necessary to allege and prove, that the bill was presented at the place designated by the acceptance. In *Callaghan v. Aylatt*, 2 Campb. 549, this was held by three Judges of the Common Pleas to be necessary. They said, the place where the bill was made payable must be considered as part of the contract between the acceptor and holder. In *Lyon v. Sundius & al.* 1 Campb. 423. Lord Ellenborough ruled this point the other way. And in *Fenton & al. v. Goundrey*, 13 East, 459. 469, his Lordship said: "Since I have been familiar with the practice and doctrine concerning bills of exchange, I have always understood, that an acceptance, though stated to be payable at a certain house of trade, binds the party to pay the bill generally and universally; and that there is no occasion to make a demand at the particular place, in order to found the right of action on the bill, but that the action itself is a demand upon the party sued. For the information of the holders, bills are generally directed to the drawees at their usual place of residence; but it is no part of the contract that the bill shall be presented there." The other Judges of the King's Bench concurred with the Lord Chief Justice.

It has been held both in *England* and in this country, that if a promissory note is made payable at a particular place, in an action against the maker, there is no necessity for proving that it was presented there for payment. *Wild v. Remonds*, cited 1 Campb. 425, n. *Dodge v. Lawman*, in error, *cor. Sup. Ct. Connecticut, Hartford County, February Term, 1806.* [MS.]

(2) [The much disputed point of the necessity of presenting the paper for payment at a place designated by the maker of a note or acceptor of a bill, where the suit was against either of those parties, in order to fix their liability, seems to be settled against such necessity in this country, by the decisions of the Supreme Court of the United States, and by those of the highest tribunals in most of the States of the Union. In 13 Peters, 136, 144, *Wallace v. McConnell*, and in 3 Kent's Commentaries, 3d ed. 97, &c., many of the cases will be found; as also in Chitty on Bills, (10th Amer. ed.) from p. 360 to 366. See upon the same point, *Filler v. Buckley*, 2 W. & S. 458.

In *England*, after much difference of opinion, the question was decided by the House of Lords, in *Roses v. Young*, 2 B. & B. 165, 2 Bligh. 391, in favour of the necessity of such presentment, even in a suit against the acceptor of a bill, in consequence of which, the Stat. 1 & 2 Geo. 4. c. 78, was passed, declaring that presentment of a bill or note at the place designated, shall only be necessary when the acceptance or note is declared in terms to be payable at a particular place "only, and not otherwise or elsewhere." As, however, against the endorser of a bill or note, averment and proof of presentment at the place specified, are, in general, requisite. *Bk. U. S. v. Smith*, 11 Wheat. 171.—W.]

(a) *Vi. Bishop v. Chitty*, 2 Str. 1195.

The King v. Crisp.

7 Ems, 369. May 17, 1806.

A conviction on the malt act, 42 G. 3. c. 38. s. 30, dated 4th of June 1806, stated that on the 29th of May 1806, R. P. informeth us (three justices) that at the time of committing the offence after mentioned the defendant was a maltster, and within three months now last past, viz. on 12th of May now last past, at W. &c. did wet certain grain of him the defendant, then and there making into malt in a certain stage of operation, &c.: and thereupon afterwards on the 4th of June, (no year mentioned) at W. the defendant having been duly summoned, now here appears before us, &c. and having heard the information read, is asked, &c. and thereupon the defendant denieth, &c. whereupon we do now here proceed to examine, &c. and on the day and year last aforesaid at W. &c. J. F. officer of excise, now here comes before us, &c. and deposes, &c. in the premises, that he surveyed the malthouse of the defendant at W. aforesaid, on the said 12th of May, and found a floor of malt in operation, very wet, &c. and the defendant is now here again called upon by us, &c. for his further defence, but no other evidence is now here produced, &c. whereupon it is adjudged, &c. (stated to be signed and sealed on this 4th of June 1806.) Held

1st, That the offence being charged 'to be committed on the 12th of May now last past, the antecedent date being the 29th of May 1806, when the information was exhibited, and the conviction being dated on the 4th of June 1806, and it being also alleged that the offence was committed within three months now last past: it does appear that the offence was committed on the 12th of May 1806, and not in 1804. The words now last past after the 12th of May, referring to the day of the month, and not to the month; and therefore the information was in time.

2dly, The witness swearing to the offence being committed on "the said 12th of May," sufficiently refers to the 12th of May 1806, the day charged in the information, so as to shew that the offence was committed within the three months: For it is the relation of the evidence by the magistrates, who also state that the witness deposed in the premises.

3dly, By the statement of the proceedings in the conviction, it appears to have been all one continuing transaction, from the appearance of the defendant after the summons to the close of the conviction. And this appears, both from the antecedent dates of May 1806, and the date of the conviction, to have been on the 4th of June 1806, because the defendant is stated to have been afterwards (i. e. after the information exhibited) summoned, and to have appeared on the 4th of June, and the conviction was signed and sealed on the 4th of June 1806. And it thereby also appears, that the evidence was given in the defendant's presence, as his departure pending the continuance of the transaction will not be presumed. And it thereby also appears, that the conviction took place on the 4th of June 1806.

4thly, The witness deposing that he found a "floor of malt in operation," very wet, &c. being the language of the witness and intelligible to a common intent, sufficiently proves the offence charged of wetting corn or grain making into malt, in a state of operation.

5thly, The witness, an excise officer, stating in language appropriate to his employment, that he surveyed the malthouse of the defendant on the 12th of May, and there found a floor of malt in operation, &c. is *prima facie* evidence that the defendant was at that time a maltster; for otherwise it could not properly be called his malthouse, nor would the officer have had authority to survey it; as by the excise laws a party must enter his malthouse before the officer can survey it.

THIS was a conviction on the malt act, 42 Geo. 3. c. 38. s. 30, stating, "that this 29th of May 1806, at Woodbridge, in the county of Suffolk, R. P. officer of excise, exhibiteth to us R. F. &c. (three justices of the peace,) an information and complaint; and thereby informeth us, the said justices, that before and at the time of the committing of the offence hereafter mentioned, one Steffe Crisp was a maltster and maker of malt, viz. at Wangford, in the said county of Suffolk; and so being there such maltster and maker of malt, he, the defendant, within three months now last past, viz. on the 12th of May now last past, at W. did wet, &c. certain corn and grain of him the said S. C. then and there making into malt in a certain state and stage of operation, viz. while the said corn and grain so making into malt as aforesaid was a floor, after the said corn and grain had been taken from and out of the cistern of him the defendant, used by him for steeping the said corn and grain, and before the end of twelve days from the time when the said corn and grain had been

so as aforesaid taken from and out of the said cistern; contrary to the form of the statute, &c. whereby and by force of the statute, &c. he, the defendant, hath forfeited 200*l*. And thereupon the said *R. P.* who prosecuteth as aforesaid, prayeth judgment, &c., and that the defendant may be summoned to answer the premises, before us, &c. and that he the said *R. P.* may have one moiety of the said penalty and forfeiture. And thereupon *afterwards, to wit, on the 4th of June, at W. &c.* the defendant having been previously duly summoned, &c. to appear before us the said justices, to make his defence to the said information, now here appears before us, the said justices, in his proper person; and having heard the said information read to him, he is asked by us, the said justices, &c. why he should not be convicted of the premises charged upon him in and by the said information; and thereupon he, the defendant, denieth the matters contained in the said information, and saith that he is not guilty thereof as is therein alleged: whereupon we the said justices, *do now here, at the request of the said informer, proceed to examine into the truth of the matters contained in the said information; and thereupon on the day and year last aforesaid, at W. &c. J. F.* officer of excise, and *W. R.* officer of excise, on the part of the said informer now here come before us, the justices, and being duly sworn, &c. depose and say in the premises as follows. And first, the said *J. F.* on his oath saith, that he is an officer of excise. That the said defendant is a maltster at Wangford, in this county. That he, with the said *W. R.* surveyed the malt-house of the defendant, at *W.* aforesaid, on the said 12th of May, and found a floor of malt in operation very wet. That the said floor of malt had been only four days out of the cistern. That the said floor had been watered since it was thrown from the cistern. And the said *W. R.* upon his oath saith, that he surveyed the said malt-house with the last witness on the said 12th of May, and he is sure that the said floor of malt had been watered since it was thrown from the cistern. That it had been out of the cistern only four days on the said 12th of May. And the said defendant is now here again called upon by us the said justices for his further defence in the premises: but no other evidence is now here produced to us, &c. Whereupon all and singular the premises being seen, &c. it appears to us the said justices, that the defendant is guilty of the premises charged upon him in and by the said information, in manner and form as is therein alleged. It is therefore adjudged by us, &c. that the defendant be convicted, &c. of the said offence charged upon him as aforesaid, according to the form of the statute, &c. And we do adjudge that the defendant hath for his said offence forfeited 200*l*. &c. In witness whereof we, the said justices, to this our record of conviction have set our hands and seals at *W.* aforesaid, this 4th of June 1805," &c.

Abbott took several objections to this conviction. 1st, The information does not expressly shew the offence to have been committed within three months before. The information is taken on the 29th of May 1805, and it charges an offence the 12th of May now last past, which is uncertain and bad; as it may either refer to the 12th day last past of the same month, or to the month of May last past, which would carry it back to the antecedent year, and be out of time; and if either be preferred, it must be the month, being the last antecedent.

Per Curiam. It is alleged to be "within three months now last past;" and coupling that with the other allegation it makes it quite clear.

2d objection. The evidence does not prove the offence to have been committed within the three months. The witness swears that on the said 12th of May he surveyed the defendant's malt-house, &c. but it does not appear to what 12th of May he referred; for *non constat* that the information was read over in the presence of the witness; or that he referred to it: and these are the words of the witness, and not of the magistrates.

Per Curiam. The evidence is stated as the relation of it by the magis-

trates. It is in the third person, "*he surveyed*," &c. and not in the first person, as coming out of the witness's mouth; and therefore it may well refer to the same date before mentioned in the information; and the witnesses are said to depose in *the premises*, which incorporates it with what goes before.

3d objection. It does not appear that the evidence was given in the presence of the defendant; nor is it supplied by shewing that all the proceedings passed in one day.

Per Curiam. It is all stated as one continuing transaction before the justices on the 4th of June 1805, when the conviction took place. After stating the defendant's appearance to the summons on the 4th of June, *now here before us*, &c. it proceeds, "*we, the said justices, do now here proceed to examine, &c. and thereupon on the day and year last aforesaid, &c. the witnesses now here come before us, &c. and depose,*" &c. The Court will not intend a departure of the defendant where the whole is stated as one continuing transaction.

3d Objection re-stated. The witnesses are stated to have been heard on the *day and year last aforesaid*. Now the *day last aforesaid* is the 4th of June, but no year is mentioned there.

Per Curiam. The only year before mentioned is 1805. It appears to have been after the information exhibited in May 1805, and it must have been before the signing and sealing the conviction, which was on the 4th of June in the same year.

The same objection was afterwards urged in another shape, that it did not appear with certainty on what day the conviction took place; for it might be drawn up and signed and sealed in form at any time subsequent; and therefore the date at the end did not necessarily shew that it took place at that time. To which the same answer was given by the Court as last mentioned.

4th Objection. The evidence does not prove an offence within the statute. The offence is the *wetting, &c. of corn or grain making into malt*, in a state of operation, within twelve days after it is taken from the cistern used for steeping it. The evidence is, that the witnesses found a *floor of malt in operation* very wet, which had been watered within four days after it had been taken from the cistern. But *corn or grain making into malt is not malt*: and in s. 31, of the act there is a distinct penalty for wetting *malt* before delivery to the brewer: and the duty is on the malt in its finished state. At least it should have been stated, that it was so wetted before it had been taken twelve days out of the cistern used by him for steeping it. Whereas it might have been in operation for *brewing*, and have been taken out of the cistern used by him for *brewing*.

Per Curiam. It is stated to be a floor of *malt in operation*, which implies that it was not finished. This is the language of the witness, which must have a reasonable intendment, and is to be understood according to common parlance and the general understanding of mankind: according to which the language used is certain enough. If a witness were to give evidence of a prisoner's *colouring a shilling*, upon an indictment on the statute 8 and 9 W. 3. c. 26, it might equally be objected that the base blank was not a *shilling*; nor is it so; yet the evidence would be perfectly intelligible and relevant to the charge. If indeed it could have been shewn that there was any way in which a *floor of malt* could be in operation for any other purpose than that of making into malt, a doubt might have been thrown upon it; but none such can be suggested.

5th Objection. The evidence does not prove the defendant to have been a maltster at the time of the offence alleged to have been committed. The witness only says that the defendant is a maltster. That must refer to the 4th of June on which the witness was examined; but *non constat* that the defendant was a maltster on the 12th of May. And this is not supplied by the witness saying that he went to the *Malt house of the defendant* on the 12th of May; for a

man may have a *malt-house*, and yet not be a *maltster*; or he may have a building called *the malt-house*; or it might be his malt-house in the occupation or possession of a tenant or other person. It is not even stated that the *malt* or the *cistern* belonged to the defendant.

The Court said they would hear the prosecutor's counsel on this objection.

Prere in support of the conviction, contended that the defendant appeared to have been a maltster at the time of the offence committed, 1st, by reference to the information where the fact is so alleged, and which is connected with the evidence by the relative word *said*, (That the *said* defendant is a maltster, &c. :) and he cited *Rex v. Tucke*,^(a) where, in a conviction on the stat. 6 & 7 W. 3. c. 11, for profane cursing, the information stated that the defendant on such a day, *ad tunc existens generosus et ultra ætatem sexdecem annorum*, did, on the same day, profanely swear, &c. And the witness deposed that the *said* defendant, on the said day, swore, &c. And one of the objections was, that the statute making a difference in the punishment according to the degree and age of the offender, the witness ought to have proved that he was a *gentleman* and *above 16 years of age*. But the Court were of opinion, that this sufficiently appeared by the "*predictus* defendens," which referred to the person so described in the information. So *maltster* is a *descriptio persone* in the information, to which the witness must be supposed to refer by the word *said*. 2dly. It must necessarily be collected from the evidence stated, that the defendant was a maltster at the time of the offence committed; for the witness, an excise officer, says that he *surveyed the defendant's malt-house* on the 12th of May, and found a floor of malt in operation, &c. Now the defendant could not have had a *malt-house* in which malt was in operation without being a maltster; nor could the officer have *surveyed* it (which is a technical phrase) unless it were first *entered* by the defendant as a *malt-house*. And he added, that it was a novel doctrine to require such extreme nicety in setting out the evidence in convictions, the true object of requiring which was, that the witness should not be made to swear to the law; but if his language were intelligible to the magistrates at the time, and they draw the conclusion of guilty from it, it was sufficient: and credence ought to be given to the justness of their conclusion, which it is within their province to make, *Rex v. Smith*, 8 Term Rep. 588, unless the contrary expressly appeared. It is more like a demurrer to evidence than a special verdict. Here the defendant being present at the time and hearing the evidence, it was competent to him, if he had not been a maltster at the time of the offence committed, to have stated that by way of defence when called upon; and not having done so, the fair conclusion from the whole of the evidence was, that he was then a maltster.

Abbott, in reply, said that the case of *Rex v. Tucke*, stood alone: for that where the degree, description, or age of the party was a competent part of the offence, it was as necessary to be proved, to sustain a conviction, as any other independent fact: though it might be otherwise, where it was only stated by way of addition, *pro forma*. That the witness did not prove that it was an *entered* malt-house; still less that it had been so entered by the defendant. And the mere term *surveyed*, which was in common use, and not confined to a technical sense, did not necessarily imply that the malt-house had been entered by the defendant, and could not have supplied the want of finding such a fact in a special verdict.

Lord ELLENBOROUGH, C. J. (after expressing great doubt of the case of *The King v. Tucke*, particularly as to making any intendment as to the party's age, without evidence of it, merely by the reference from the word *predictus* to the

(a) 2 Ld. Raym. 1396. The same case is reported in 1 Sess. Cas. 354, and 8 Mod. 366, which latter book says that since the defendant was charged with *two shillings* for every offence it should be intended that he was a *gentleman*, if so charged by the informer; and that it should also be intended that he was *of age*, if so charged by the informer.

allegation in the information; though he inclined to think that the addition of *generossus* might be so adopted into the evidence;) upon the second ground, said, If any material fact were wanting in the evidence to make out the charge, I should be very unwilling to supply it by intendment; but taking the whole of the evidence together, it does sufficiently appear that the defendant was a maltster at the time of the offence committed. All the difficulty arises from the order in which the evidence was taken down. The witness begins by stating that the defendant is a maltster; which would refer to the time he is speaking, viz. the 4th of June. But, without advertg to that, see how the evidence would stand without it. The witness then deposed, that *on the 12th of May, he surveyed the malt house of the defendant, and found a floor of malt in operation, &c.* Now it could not be then the defendant's malt-house, nor could the officer then have surveyed it, unless *the defendant had entered the malt-house as a maltster*; it would otherwise have been mis-called the defendant's malt-house. The term *survey* too is used in the malt acts; and I believe that the officer has no authority to survey a malt-house unless it be entered as such.^(a) And this, it must be remembered, is the language of the excise officer who is relating what he did in the course of his duty as such officer; and the evidence given by him naturally imports that the malt-house of the defendant, which he surveyed, belonged to the defendant in the character of maltster.

GROSE, J. I doubted at first whether it sufficiently appeared upon the face of the conviction that the defendant was proved to be a maltster at the time of the offence committed; but I think we must understand the language of the witness as it would be understood by common men: and a common man would understand from the words used by the witness, that the defendant was a maltster on the 12th of May, when the witness, as an excise officer, *surveyed his malt-house*; and that, I think, is the fair import of the evidence.

LAWRENCE, J. I must own that I have great doubts whether the fact of the defendant's being a maltster at the time of the offence alleged to be committed sufficiently appears. I have always considered that in these summary convictions the evidence necessary to support the charge ought to be precise; and it is not usual to have recourse to inference, in order to support a conviction. There must be some mistake in the report of *Tucke's* case in *Lord Raymond*; for it is clear that the defendant's age ought to have been proved; for his being above 16 was an ingredient in the offence created by the statute; and it has been the constant practice of the Court to quash convictions if not supported by the evidence stated. Now supposing the evidence given here, to which it is said that our attention is to be confined, had only been that the officer *surveyed the defendant's malt-house*; can we infer merely from the word *survey* that the malt-house surveyed was a malt-house entered by the defendant, and that he was a maltster at the time? This, I think, would be going further in support of a conviction than any case has yet gone the length of.

LE BLANC, J. It is clear that the evidence need not be given in any precise technical form of words. It is sufficient if we collect from the plain import of the language used that the offence charged was proved. The evidence, it must be remembered, is given in the presence of the defendant. The witness is an excise officer, who naturally gives his evidence in the language appropriate to his situation. He states that he *surveyed the malt-house of the defendant* on the said 12th of May, and found a *floor of malt in operation, &c.* And the question is, whether the magistrates are not *prima facie* to collect from this evidence that the defendant was a maltster at that time? There is no contradiction to this. And if it were sufficient *prima facie* evidence from whence the magistrates might collect that fact, it is sufficient to warrant the conviction.

Conviction affirmed.

(a) This was so stated at the bar.

Horncastle and Others v. Suart.

7 East, 339. April 26, 1806.

Where a ship was chartered on a voyage from *London* to *Dominica* and back to *London*, at a certain rate of freight upon the outward cargo; and after delivering her outward cargo at *Dominica*, the charterers were to provide her a full cargo homeward at the current freight from *Dominica* to *London*, &c.; held that an insurance by the owner of the ship on the freight, *at and from Dominica to London*, attached while the ship lay at *Dominica* delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced.

THIS was an action on a policy of insurance on freight of the ship, *The Marquis of Lansdown*, "at and from *Dominica*, and all or any of the *West India* islands (*Jamaica* and *St. Domingo* excepted) to *London*," warranted to sail on or before the 1st of *August* 1805. The declaration, after stating the policy, which was in the usual form, alleged that before the making of the policy the plaintiffs, by a charter-party of affreightment, of the 25th of *August* 1804, chartered the ship to *Urquhart* and *Hope* for a voyage from *London* to the island of *Dominica*, and back to *London*, upon these amongst other terms and conditions, that, the master should take on board in the river *Thames* all such goods as the freighters could procure on freight for *Dominica*, &c. and, as soon after the 1st of *October* 1804 as required by the freighters, sail with the first *West India* convoy to *Dominica*, and there deliver her outward-bound cargo, and take on board at *Dominica*, from the correspondents of *Urquhart* and *Hope*, a full cargo of *West India* produce at the current freight for *London*, and so loaded, proceed with the *May* convoy for *England*, provided the ship should have arrived at *Dominica*, and ready to discharge 90 days previous thereto. And *Urquhart* and *Hope* thereby agreed to pay the plaintiffs half of the net freight which the ship should make outwards, provided such net freight should exceed 1000*l.* but if it did not amount to 1000*l.* then they should pay the plaintiffs 500*l.* And *Urquhart* and *Hope* also bound themselves to procure for the ship at *Dominica* a full cargo at the current freight for *London*, and to dispatch her homeward by the *May* convoy, if she arrived there and ready to discharge 90 days previous to the sailing of the said convoy, &c. But if the ship sailed with the *May* convoy, and was not fully loaded, after having arrived as before specified, when the freighters agreed to pay the owners dead freight for the deficiency; and if she was detained after the *May* convoy through default of the freighters, they agreed to pay the owners 10*l.* a day demurrage, until the sailing of the next convoy, &c. The plaintiffs then averred, that after the making of the charter-party, the ship took in her outward-bound cargo on freight for *Dominica*, and sailed within the time required from the River *Thames* for *Dominica*, and arrived there on the 6th of *February* 1805, and delivered her outward cargo, except such part as was necessary and customary to keep on board until some part of the homeward cargo should be loaded. That after the arrival of the ship at *Dominica*, the correspondents of *Urquhart* and *Hope* had procured a full cargo of *West India* produce to load the ship on freight from thence to *London*, which cargo, at the time of the loss after mentioned, was there ready to be loaded on board the ship; but that before she could take any part of the homeward cargo on board, and while she lay at *Dominica*, and before the sailing of the *May* convoy, she was, on the 22d of *February* 1805, captured by the enemy.

At the trial before Lord *Ellenborough*, C. J. at Guildhall, the policy and charter-party, which appeared to have been made as stated in the declaration, were proved; and that the ship having sailed on the voyage described arrived at *Dominica*, and unloaded great part of her outward-bound cargo, but before

she had taken in any part of her homeward-bound cargo was captured there by the *French* on the 22d of February 1805. Whereupon it was objected, that the policy on the freight homewards did not attach, inasmuch as no part of the homeward cargo was laden on board, from which time only the risk commenced. And it was endeavoured to distinguish this case from *Thompson v. Taylor*, 6 Term Rep. 478, where the insurance was on a *valued* policy on freight on a chartered ship at and from London to *Tenerife*, and at and from thence to the *West Indies*; and which, it was said, turned on the entirety of the voyage insured; the freight being covenanted to be paid for the said voyage according to a stipulated rate per pipe for 500 pipes of wine: whereas this was an open policy, and the freight was to be estimated according to the quantity of goods on board; of which there never were any, and therefore no inception of the freight, and consequently not of the insurance on it. And this, it was argued, was the same as if the ship had sailed from *Dominica* without any goods on board. Lord *Ellenborough*, C. J. however, over-ruled the objection, thinking the case was governed by *Thompson v. Taylor*, and that the existence of the charter-party, giving an entirety to the contract of freight, was decisive; the voyage having once commenced. The plaintiffs accordingly recovered a verdict.

Garrow now moved for a new trial, upon the same grounds of distinction before taken between this and the former case. But

Lord *ELLENBOROUGH*, C. J. said, that it was clear that the under-writer was liable, upon the authority of *Thompson v. Taylor*; the voyage having commenced in which the freight was to be earned according to the terms of the charter-party, which made it one entire contract, and which voyage was insured by the policy. That in *Thompson v. Taylor* the loss happened before the ship arrived at *Tenerife*, where she was going to fetch her freight, and yet the under-writer was holden to be liable. The other Judges concurring,

Rule refused.(1)

(1) Vide *Mackenzie v. Shedden*, 2 Campb. 431. *Livingston v. Columbian Insurance Company*, 3 Johns. 49. *Taylor v. Lowell*, admr. 3 Mass. 331. See also *Forbes v. Cowie*, 1 Campb. 520, and the distinction taken by Lord *Ellenborough* between that case and the text.

CASES

IN

TRINITY TERM,

IN THE FORTY-SIXTH YEAR OF THE REIGN OF GEORGE III.

Robertson v. Patterson.

7 East, 405. June 6, 1806.

The defendant, a seaman, being out upon bail on process for a debt under 20*l*. was impressed into the King's service; and as he would have been entitled to his discharge if in custody, by virtue of the stat. 32 G. 3. c. 33. s. 22, the Court, on application of the bail, ordered an *exoneretur* to be entered on the bail piece in the first instance.

THE defendant, being a seaman, was arrested at the suit of the plaintiff for a debt of 17*l*., and bailed; after which he was impressed into his Majesty's service, where he is still retained. In the last term, the defendant's bail applied to a judge in court for a *habeas corpus*, directed to the commander of the ship on board of which the defendant was after he was impressed, to bring him up, for the purpose of being rendered in discharge of his bail; which was denied: and thereupon a rule *nisi* was obtained for entering an *exoneretur* on the bail-piece, on the ground that by act of law the bail were rendered incapable of taking the body of the defendant for the purpose of rendering him, and therefore ought not to be prejudiced: and that if he had been in the service at the time, he could not have been arrested for a debt of 17*l*.

Laves now shewed cause, and argued the case, first, on general grounds, that the bail had by their recognizance undertaken at all events to render the body of the defendant, or pay the debt, &c.; and the plaintiff ought not to be prejudiced by the exercise of a prerogative to which the bail knew that the defendant was liable at the time when they became bail for him, and which could not have been exercised, if the defendant had remained in custody. That this distinguished the case materially from cases under the alien act, (a) where an *ex post facto* law had rendered the bail incapable of performing the condition of their recognizance, by enabling the King to send the defendant out of the kingdom: and which would have operated on him if he had remained in custody. But here *non constat* that the defendant might not be at large again before the bail could be called upon; final judgment not having been yet signed. And the Court had refused to enlarge the time for bail to render their principal on account of the illness of the principal, whose life would have been endangered by the removal, *Wynn v. Petty*, 4 East, 102; saying, that the inconvenience should rather be borne by the bail than by the plaintiff, who would otherwise be delayed of his right. 2dly, He relied on an

(a) *Merrick v. Voucher*, and other cases of the same sort, 6 Term Rep. 50. 52.

affidavit which stated, that the bail had declared that they were indemnified, which fact in the cases under the alien act the Court had required the bail making the application to negative before they would grant the application. And the affidavit also stated, that after the defendant was impressed he had agreed to enter as a volunteer, and had received the bounty.

Sir *V. Gibbs* and *Espinasse*, contra, denied the fact of the bail being indemnified, of which they desired time to procure an affidavit, on the ground of surprize. And as to the defendant's having, since his being impressed, entered and received the bounty money, it could not, they said, vary the condition of the bail. On the general ground they relied principally on the stat. 32 G. 3. c. 33. s. 22, which enacts that no seaman, &c. on board any of his Majesty's ships *shall be liable to be taken out of the King's service by any process or execution whatsoever* (other than for some criminal matter,) unless such process or execution be for a real debt contracted by such seaman, &c. when he did not belong to any ship in the King's service, or other just cause of action, &c. *to the value of 20l. at the least, &c.* And if any person be arrested, contrary to the intent of this act, it enables any judge of the Court, on application, to discharge him. It appears from thence, that if the defendant had been rendered in discharge of his bail, it would have been a nugatory act, as he would the next moment have been entitled to his discharge: and as the defendant cannot now by law be taken out of the King's service, the bail ought not to be prejudiced; but the Court will at once enter an *exoneretur* on the bail-piece upon the same principle as in the case of one out upon bail who becomes a peer, *Trider v. Shirley*, Dougl. 45.

Lord ELLENBOROUGH, C. J. at first suggested what might be considered as the relative situation of the defendant and his bail in respect of the Crown. That the bail being the manucaptors of the defendant had a right to retake him while he was at large; and the Crown also had a right to his personal service as a seaman. That if the bail were desirous of exercising their right of caption, they should have done so before the Crown interposed, and acquired by the impressing of the defendant a possessory right, as it were, to his person: and that that possessory right could not be divested by any *ex post facto* act of the bail. That here therefore the Crown had acquired by act of law a right to the defendant's person paramount to the right of the bail to take him.

Afterwards all *The Court*, upon consultation, agreed that as the granting a *habeas corpus* to bring up the defendant for the purpose of being rendered by his bail would only be going through a circuitry of delay and expence, which could answer no purpose whatever to the plaintiff, as the defendant would be immediately entitled to his discharge under the provisions of the stat. 32 G. 3, by which no seaman could be taken out of the King's service by any process, &c. for a debt to any amount contracted after he was in the service; nor by any process, &c. for a debt under 20l. contracted before he was in the King's service; which latter was the present case: (and in that respect the case was assimilated to *Bond v. Isaac*, 1 Burr. 339, where such a course was taken:) therefore they thought it was more consonant to sound sense at once to enter an *exoneretur* upon the bail piece, (a) without going through the forms of a *habeas corpus*, a render, and immediate discharge of the defendant. But before they made the rule absolute, they required the bail to make an affidavit that they were not indemnified: and a satisfactory affidavit of this fact having been produced on a subsequent day,

The Court made the

Rule absolute. (1)

(a) Vide *Wood v. Mitchell*, 6 Term Rep. 247, where this was done in the case of one under sentence of transportation for felony. But in *Sharp v. Sheriff*, 7 Term Rep. 296, where the defendant was in custody on a charge of felony, the Court granted a *habeas corpus* to bring him up, in order that he might be rendered by his bail.

(1) Vide *Folkia v. Critina*, 13 East, 457.

Brown v. Rawlins.

7 East, 409. June 7, 1806.

Where the tenants of a manor formerly belonging to a monastery, holding *by border service*, and the defence of *Tynemouth castle*, under copy of court-roll, and whose estates passed by surrender and admittance, shewed in evidence by surrenders as far back as they existed in writing; by admissions from the 17th of Eliz. to the 14 Car. 1; by exchequer decrees between the lords and tenants in the times of Elis. and Jac. 1; and by an inquisition of the jury at the court baron of the lord in the 2 Jac. 2; that they were *copyholders of inheritance*, with *finis certain*, holding according to the custom of husbandry of the manor (or according to the custom of the manor generally) without stating them to hold at the will of the lord: admitting this evidence to outweigh proof of minister's accounts in the 30th and 31st Hen. 3; a grant of the manor from the crown in the 9th Car. 1, including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal mines, &c. in certain districts; and admissions from 1663 to 1777 (including admissions of the several tenants to the estate immediately in question) in all which they were stated to hold at the will of the lord as well as according to the custom of husbandry of the manor, &c.: Yet as there was evidence for more than a century past that the lord had leased the coal and limestone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord and not the tenants, had taken the coal and limestone; held that such acts of ownership explained the nature of the tenure according to the custom of the husbandry of the manor, &c. and shewed in aid of the other evidence, that the freehold was in the lord, and not in the tenants. And at any rate, the evidence preponderating so much in favour of the lord, the court would not disturb a verdict given for him.

THIS was an action of trespass for breaking and entering the plaintiff's close in the township of *Backworth* in the county of *Northumberland*, part of a farm there called *Lowstead Farm*, and making trenches and pits in the soil. The defendant pleaded, 1st, not guilty, to the force and arms. 2dly, To the residue of the trespass, that the *locus in quo* was the close, soil and freehold of the Duke of *Northumberland*, as whose servant the defendant justified. 3dly, To the same residue, that the Duke was seised in fee of the manor of *Tynemouth* or *Tynemouthshire*, whereof as well the *locus in quo* as other land in *Backworth* was and immemorially had been parcel and a copyhold tenement of the manor, demised and demiseable by copy of court-roll by the lord or his steward in fee-simple or otherwise at the will of the lord, according to the custom of the manor; and that the Duke, being so seised of the manor, was by reason thereof entitled to all mines and veins of coal in and under the *locus in quo*, and to bore for, dig for, and get such mines and veins of coal: wherefore the defendant, as servant to the Duke, entered and dug, &c.; and so justified the trespasses. Replication to the plea of soil and freehold, alleging by way of inducement Sir *M. W. Ridley's* seisin of the *locus in quo*, parcel of a customary tenement holden by copy of court-roll of the same manor in his demesne as of fee, according to the custom of the manor, and a demise by him to the plaintiff; traversed the allegation of soil and freehold in the Duke. To the last plea; after a similar inducement, the replication traversed that the *locus in quo* and the other land were and immemorially had been parcel of a copyhold tenement of the said manor demised and demiseable by copy, &c. by the lord or his steward, in fee simple or otherwise at the will of the lord, according to the custom of the manor, as in the last plea alleged. The rejoinder took issue on each of the traverses.

At the trial before *Chambre, J.* at the last summer assizes for the county of *Northumberland*, the contention between the parties was as to the nature of the tenure of the plaintiff's estate, whether copyhold or of the nature of copyhold, as contended for by the Duke, who claimed a right to enter and dig for coal: or freehold, or customary freehold, as contended for by the plaintiff, who was tenant to *R. W. Grey, Esq.*, and resisted the Duke's claim.

The defendant, who took the affirmative of the issues, gave the following evidence: 1, an examined copy of the enrolment of letters patent of 16th of May, 9 Car. 1, whereby the Crown granted the manor of *Tynemouthshire* in fee to *W. Scriven* and *P. Eden*, Esqrs., with all its rights, members, and appurtenances, and all its lordships, manors, townships, &c. tenements, tithes, and hereditaments in *Preston*, &c., *Bakeworth*, &c., late parcel of the possessions of the late monastery of *Tynemouth*, to wit, &c. (enumerating the particulars; amongst which *Bakeworth* called *Backworth* in the declaration, is thus described;) "and all those ten tenements of husbandry with their appurtenances in *Bakeworth*, now or late in the several tenures or occupations of *G. W.*, &c. or of their assigns, at the will of the lord, by the particular thereof mentioned to be of the annual rent or value of 10*l.*; and all that garden with the appurtenances in the tenure of all the tenants there at the will of the lord, by particular thereof mentioned to be of the annual rent or value of 20*d.*; and all the tithes of hay of the said township, &c. and pannage of hogs, and also all those 35 qrs. of wheat and 10 qrs. of oats annually coming of the rent of the said ten tenements of husbandry in the township of *Bakeworth* annually to be delivered, lately demised to *Henry* Earl of *Northumberland*, by the particular thereof mentioned to be of the annual rent of 48*l.* 10*s.* 8*d.*" The greatest part of the tenements enumerated in the other districts, is in like manner described as tenements of husbandry, at the will of the lord; and the whole is said to be parcel of the possessions of the late monastery of *Tynemouth*. On the 2d of August in the same year, these premises were conveyed, by bargain and sale inrolled, by *Scriven* and *Eden* to *Taylor* and *Cartwright* in fee, with an exception of the mines and veins of coal in certain parts, (not including *Backworth*) and the rents arising therefrom. And on the 16th March 1640, by another bargain and sale, the same were conveyed by *Cartwright* and *Taylor* to *Algernon* Earl of *Northumberland*, with the further exception of a coal mine in another of the parts, which the Earl and the bargainors had sold to *Read* and *Milburn*. 2. An examined copy of the ministers' accounts for the monastery of *Tynemouth* from Mich. 30 H. 8, to Mich. 31 H. 8. (an. 1538—40.) The part relating to *Backworth* is the account of *T. D.* the collector of the rents there. Under the head of "*husbandry rents*," it describes the tenements out of which they issue as being "*at the will of the lord*." The amount of the rents correspond with the letters patent 9 Car. 1, as did most of the surnames of the different persons in whose tenures the respective tenements of husbandry were alleged to be. 3. The rolls of the manor of *Tynemouth*. These were produced out of the *Evidence Room* at *Alnwick Castle*. An entry was read in 1663 of a presentment by the jury of a surrender by *O. Ogle* of a customary tenement in *Backworth* within the manor, to the use of *R. Grey* Sen. (ancestor of the plaintiff's lessor) and his heirs: whereupon the said *R. Grey*, came into Court, and demanded to be admitted tenant, to whom the lord, by his steward, granted seisin. The habendum to *Grey* and his heirs, at the will of the lord, according to the custom of the manor, under the rents, &c. The oldest remittance rolls were in 1662. Several admissions were read 18th April 1677. It is found by the homage, that *R. Grey* of *Newcastle*, a customary tenant of the manor died seised of 6 several customary tenements in *Backworth*, and that *R. G.* is his son and next heir, to whom the lord, by his steward, grants seisin of the said customary tenements, habendum to him and his heirs at the will of the lord, according to the custom of husbandry of the manor, rendering, &c. Two other similar admissions in 1679 of different tenants of different customary tenements in *Backworth*. Another similar one in 1684. Another admission in 1684 of *J. Ogle*, as next heir on the deaths of *O.* and *L. Ogle*, where the habendum is to him and his heirs at the will of the lord, according to the custom of the manor, (not calling it the custom of husbandry). 17th October 1687, it is found by the homage that *R. Grey*, of *Backworth*, Esq. a customary tenant

of the manor, died seised of 6 customary tenements in *Backworth*, and of others, &c. : and that *R. G.* of *Backworth* is his son and next heir, &c. to whom the lord, by his steward, grants seisin; *habendum* to him and his heirs, *at the will of the lord, according to the custom of husbandry of the manor*, rendering, &c. ; and he is admitted accordingly. 25th April 1771, it is found by the homage (*R. W. Grey*, Esq. the plaintiff's lessor being upon the homage) that *E. C.* and Sir *R. B.* with Mr. *Grey*'s privity and direction, had surrendered out of Court a moiety of a customary or copyhold tenement, in *Backworth*, to which *E. C.* and Sir *R. B.* had been admitted in 1760, on the surrender of the said *R. W. Grey*, to the use of *M. Bell*, Esq. according to the custom, upon trust; to whom seisin is granted; the *habendum* being in the same form as the last preceding; and he is admitted. There were two other similar admissions of Mr. *Bell* as a trustee at the same Court, on surrenders made by different trustees of Mr. *Grey*; and these three admissions comprehended the whole township of *Backworth*. 17th April 1777, the homage (Mr. *Grey* being again named as one) find a surrender out of Court by Mr. *Bell*, with Mr. *Grey*'s privity and direction, of the different tenements to which Mr. *Bell* had been before admitted, (describing them): which surrendered premises consist of *ten customary or copyhold tenements or farmholds* in the said township of *Backworth* (being the whole of the township,) &c. to the use of Sir *M. W. Ridley* and *C. Brandling*, Esq. and their heirs: and seisin is granted to them; with the *habendum*, &c. in the same terms as in the admissions of 1687 and 1771. 4. It was proved by one who had been bailiff of the manor from 1782, that no copyholder in any part of the manor of *Tynemouth* had ever gotten or bored for coal in his own copyhold; and that he had never prepared any licences for copyholders to make waggon-ways. And this was confirmed by another who had been colliery agent to the *Northumberland* family for 30 years; though Mr. *Grey* had tried 14 years ago for coal in his own freehold out of *Backworth*. As further proof that the tenure was not of a freehold nature, but copyhold at the will of the lord, the following evidence of enjoyment of the coals and other minerals in all the estates holden by copy of court-roll within the manor was given. 1. The counterpart of a lease of *June* 1700, whereby the then lord, in consideration of 1000*l.*, and of 500*l.* secured to be paid as a fine, and of the rent, &c. reserved, demised to *J. Atkinson* all the coal-mines, coal-pits, collieries and seams of coal, as well opened as not opened, within and under, &c. *all the lands, grounds, and fields* within the township, territories, &c. of *Whitley*, (one of the townships within the manor) and the pier and watercourses, &c. made by a former tenant of the colliery for 21 years, paying 100*l.* rent whether the colliery should be wrought or not, and 10*s.* a fenn for all the coals gotten, &c.; with a covenant by the lessee to make satisfaction for any damage done to any of the tenants. 2. A renewed lease in *July* 1713 between the same parties for three years in addition. It was proved that the Duke had no freehold lands in *Whitley* except about 5 acres, and 40 acres of wastes by the sea shore. 3. The counterpart of a lease of *February* 1685 from the representative of the lord of the manor of *all the collieries, and coal mines, &c. within the lands and township of Earsden, in the manor or lordship of Tynemouth*, for 21 years, rendering rent; with a like covenant from the lessee. It was proved, that the Duke had no freehold in *Earsden* distinct from his estate in the copyholds, and that there were no wastes there except the *Lanes*. 4. The counterpart of a similar lease of *June* 1684 from the same representative for 21 years of a colliery in *Preston* in the manor of *Tynemouth*, formerly in the occupation of another tenant, rendering for rent 5*l.* a year and 5*s.* a fenn. There were proved to be no wastes in *Preston*, and no freehold but freehold houses, and a freehold close adjoining. The receiver of the Duke's colliery rents proved the receipt of rent for a coal-pit in *Morton*, within the manor, which was in copyhold land. Coal and lime were also proved to have been wrought in *Whitley* by Mr. *Hud-*

son, and a lease was proved of *September 1785*, executed by both parties, whereby the Duke upon the surrender of a former lease made in 1763 demised to *H. Hudson of Whitley*, for 12 years *all the limestone quarries, as well opened as not opened, within or under the copyhold lands of the said H. Hudson*, called *Whitley Park* in the townships of *Whitley* and *Monkseaton*, within the manor of *Tynemouth*, commonly called *Whitley limestone quarries*, with liberty to break ground, and dig and win limestones; subject to an *exception and reservation* to the Duke and the persons for the time being entitled to the freehold and inheritance of the manor of *Tynemouth of all other mines, minerals, and coals within or under the said lands and grounds*; and liberty to the Duke, &c. during the term to enter the said lands to dig, try, and search for any of the said reserved mines, minerals, or coals, and carry away the same, &c. yielding and paying to the Duke, &c. a yearly rent of 250*l.*; and *Hudson* also covenanted to supply the duke's tenants at rack-rent and the copyholders with limestone to be used on their estates at limited prices; and on the determination of the term, to convey, surrender, and assure to the duke, &c. and their heirs, 13 lime kilns, then erected on the premises, with power to use the same, and to lead coals, &c. by the roads then used for leading lime, &c.; and rent was proved to have been received by the duke under this lease for 24 years.

On the part of the plaintiff it was contended, that the customary estates, though they pass by surrender and copy of court-rolls, were not *copyholds at the will of the lord*, but *estates of a freehold tenure*: and the case of *Gale v. Noble*, Carth. 432, was cited to prove that estates were not copyhold unless it appeared by the rolls that they were granted *at the will of the lord*. And it was said, that though no instance in the existing rolls of admission appeared wherein they were granted otherwise than at will, yet that all those admissions were erroneous, not pursuing the terms of the surrenders, wherein the words, "*at the will of the lord*," were uniformly omitted; and that it would appear by copies of older admissions, that those words were not inserted, and by those and other evidence, that they never ought to have been inserted in the later admissions. The evidence was as follows: 1. A copy of a decree of 14th April, 19 Eliz. in the exchequer; *Milbank and Others v. Dallaval and Others*, the queen's farmers; wherein the plaintiffs state themselves and their ancestors to have been immemorially seised of tenements in *Backworth*, and six other townships, which they some time held of the prior of *Tynemouth*, and, since the dissolution, of the Queen, *by copy of court roll, according to the custom of the manor of Tynemouth, paying their rent, doing their service on the borders, and in defence of Tynemouth castle from invasion, at their own charges*. That long before the dissolution there was a composition between the prior and the tenants, that the tenants and their heirs should for their ease pay a yearly proportion of corn for half of the rent of their tenements by *Winchester* measure, &c. The rest relates wholly to a dispute as to the measure of the corn, whether by *Winchester* or *Newcastle* measure; and the decree is only that they shall pay by *Winchester* measure. 2. A copy of an inrolment of a decree of 25th April, 8 Jac. 1, in the Exchequer; which recites that *Anderson* and others, the king's *customary and copyhold* tenants, within *Backworth* and other enumerated townships, all parcel of the king's manor of *Tynemouth*, for themselves and the residue of the tenants, had petitioned the king, *affirming*, that they were *copyholders of inheritance* of several messuages, lands, and tenements, within the said townships, and had been and were seised thereof of several estates of inheritance, according to the custom of the manor. That there were *immemorial customs* within the manor for *payment of fines for admittances* to the said *copyhold* tenements, holden by copy of court-rolls of the manor *secundum consuetudinem HUSBANDRIÆ of the said manor*, upon descent, surrender, and alienation. They then set forth the amount of the different fines, being *fines certain*,

and pray relief of wrongs done by inferior officers, &c. That by reference(a) from his Majesty's the petitioners were called before the lord high treasurer, and the chancellor and barons of the Exchequer, to show how they maintained their customs for such *estates of inheritance*, and for the *certainty of their fines*: that the petitioners, after advising with their counsel, persisted to maintain their copyhold estates of *inheritance* and *custom* for such *certain fines*, and besought the Court therein; as also for that by reason of some *difference of late times in the forms of their surrenders and admittances*, far differing from their *ancient precedents*, and also in the *assessing of their fines*, as well by ignorance of the tenants, as also sometimes by the corruption of the deputy stewards, &c. which might be prejudicial to their posterity, if not reformed: and in respect the ancient court-rolls and evidences for proof of the said *estates of inheritance* and the *certainty of their said fines* were then lost, though otherwise evident by testimony of ancient men; that they might receive the benefit of the king's pleasure, touching the confirmation, &c. of their said copyhold estates of inheritance and ancient customs, and for *reducing their copies, surrenders, and admittances to their ancient form*, &c. And thereupon the lord treasurer, chancellor and barons, *gave order*, that seeing the *court-rolls* could not be found, the ancient and late *copies*, and whatever testimonies for approving the said *estates of inheritance* and the *certainty of the said fines* could be shewn by the tenants, should be examined: and as it appeared to the Court by the examination, &c. of the customs, copies and testimonies, &c. *that the copyholders were copyholders of inheritance*, and that the *ancient customs for payment of fines* within the said townships, parcels of the manor, *were, and anciently had been, such as the tenants had alleged*: therefore, on the behalf of the petitioners and the rest, who had freely given security to pay 789l. 13s. 4d. to the king, and desired that they and the rest of the customary and copyhold tenants for better satisfaction, evidence, and declaration of their ancient rights and customs might have some record thereof made in Court, &c. It was decreed, that the said ancient rights and *customs* of the said townships for their said *estates of inheritance and certainty of fines* were true; and that the copyholders *were and always had been copyholders of inheritance*, and so from thenceforth should be, &c. And that the petitioners, and all other his Majesty's *copyholders* in the said townships, should from thenceforth have, hold, and enjoy to them and their heirs the said tenements, &c. as *copyholders or customary tenants* thereof accordingly. The decree then proceeds to confirm the usage as to the *quantum of fines* on descent, surrender, or alienation. In stating the fines in *Backworth*, and six others of the townships wherein the quantum is alike, the word *freehold* is once used in the description of the tenants' estates, but occurs no where else in the decree. It is thus introduced, "that every tenant holding in present possession, as of some estate of *FREEHOLD or inheritance* of the said manor, by copy of court-roll, &c. shall pay," &c. where (as the learned Judge who tried the cause observed in his report) the word *freehold* seems used only to distinguish life interests from terms of years. The decree concludes with directing *that the forms of their copies, surrenders, and admittances, should be according to the precedents most commonly used before the 20th of Eliz.* and such fees and duties taken for the same as were lawfully used and taken before the said time, and none other nor greater. 3. An order of the Court of Exchequer in E. 12 Jac. 1, reciting part of the last decree relating to the forms of the copies; and that the Earl of *Northumberland*, the king's steward of the manor of *Tynemouth*, had *certified* the form of the copy annexed to the order, as the accustomed form of making the copies within the manor, on admission after death: on the motion of counsel for the tenants, it was ordered

(a) Vi. post, stat. 7 Jac. 1. c. 21, (from Rastall's edition of the statutes,) under the authority of which this reference appears to have been made, and which establishes the copyhold tenures and customs to be decreed during a given term under such references.

that the form of the copy should be entered in the book of orders after that order, and should stand as a precedent of copies thereafter to be made for such tenants of the manor as should be admitted after death. The form then follows, which, after stating the stile of the Court and the presentment of the death, and that *J. G.* was the son and next heir, and his appearance and prayer of admission, proceeds, "*Cui dominus rex per senescallum suum concessit inde seisinam habendum sibi et hæredibus suis secundum consuetudinem husbandrie maneris prædicti faciend: et reddend: redditum servicia et consuetudines inde prius debuit: et consuet: et dat domino de fine, &c. fecit domino fidelitatem, et admissus est inde tenens, &c.*" 4. Copies of admissions from the muniments of *Mr. Grey*, at *Backworth* 14th November. 17th Eliz. At the Queen's Court at *Tynemouth*, &c. before *Thomas Bates*, surveyor of the queen's-lands and others, *J. D.* is admitted to a tenement of husbandry in *Backworth*: the habendum is for life, according to the custom of husbandry there, (omitting at the will of the lord). (Signed), *Northumberland*. *Thomas Bates*. There were similar copies of admissions of different tenants to different tenements, 10th October, 20 Eliz.; 23d January, 38 Eliz.; 15th October, 41 Eliz.; 3d April, 11 Car. 1; and 22d October, 14 Car. 1; habendum for life, or to the tenant and his assigns, or to him and his heirs, according to the custom of husbandry of the manor, or according to the custom of husbandry there used, or according to the custom of husbandry. In two instances, 10th April, 43 Eliz., and 22d April, 4 Car. 1, it is according to the custom of the manor: in none of these instances is it said, at the will of the lord. 5. A petition (without a date) of several copyhold tenants within the manor to *Algernon Earl of Northumberland*, complaining that their copies were altered, and more than their customary fines required by his officers; and that some of the tenants had been denied their copies, though found heirs according to the custom of the manor, and notwithstanding they had paid and performed all rents and services then and formerly due and payable according to the custom of the manor on pretence that they had divided without licence; although the Earl's steward, who then declared he was one of the lords of the manor, did at court, upon application from some of the copyholders, bid them go on with the division in God's name; saying, that the next time he came he would grant them licence for division: they therefore pray to have their copies as formerly, paying their certain fines, and have their said grievances redressed. This petition appears, by an order signed in the margin, "*A. Northumberland, 29th April 1659*," to have been referred to certain persons; but nothing was determined by reason of the neglect of one of the referees. 6. 10th March, 2 Jac. 2. At the court baron of the Duke and Duchess of *Somerset*, for the manor of *Tynemouth*, the jury being charged to inquire what were the customs of the manor, and what duties, rents, and services were payable to the lord for their copyhold farms in the several townships within the manor, find, that all the copyhold estates within the manor were copyhold estates of inheritance, according to the custom of the manor: and that if any copyholder died seized, his widow should enjoy the copyhold estate during widowhood only by virtue of her husband's copy, without any fine, or taking any admittance. That on the death or marriage of the widow, the copyhold shall descend to the copyholder's eldest son, who is to take a copy at the next court. Upon such admittance by descent to pay the lord 40s. for a whole farm, 20s. for a half farm, and 10s. for a quarter: if he die without issue, the second son to take a copy, and pay such fine as aforesaid; and so from son to sons: and for lack of sons, to the eldest daughter for life only, paying 4l. for a fine of a whole farm, and so proportionably: and so to descend and come to the next heir male in succession. The substance of the other findings in the presentment is, that on voluntary surrenders the fines are double the amount of those on descent. That on surrendering a close, parcel of a copyhold, but less than a quarter of it, the fine shall be as for a quarter, with an increase of 1s. upon the rent: if more than

a quarter surrendered, the fine to be as for half a farm, &c. That if the part surrendered be a cottage or house, then the rent to be increased 1s. and a fine as for a quarter of a tenement: but if it be a mortgage surrender, and it be surrendered back to the mortgagor or his heirs, the increase of rent to cease; the full rent of the farm being preserved to the lord. In case of mortgage surrenders the condition to be indorsed on the surrender. Surrenders out of court to be before two of the homagers or customary tenants. That the copyholders by the custom may let to farm their copyhold lands to any tenant by indenture of lease for 3 years, without licence: and if for the term of 20 or 21 years, then the copyholder ought to have a licence from the lord's steward; paying his fee, without paying any fine to the lord. Surrenders to be presented at the next court: otherwise void. 7. It also appeared by the testimony of a witness who had examined the book of surrenders; that the words "*at the will of the lord*" were not inserted in any of them. That the greatest part state the surrender to be "to the use of the surrenderee, according to the custom of the manor," and the others "according to the custom of the husbandry of the manor," without any reference to the will of the lord. One of those read was 26th December 1770: a surrender out of Court by Mr. Grey's said trustees, with his privity and direction, of the moiety of a customary or copyhold tenement or farmhold in *Backworth*, (to which they had been admitted on the 15th of April 1760,) on a surrender by Mr. Grey to the use of *M. Bell, Esq.* and his heirs according to the custom of the said manor, (making no mention of husbandry or the will of the lord) in trust, &c.

The case was left to the jury upon this evidence; and the learned Judge observed to them, that he thought there was no weight in the plaintiff's objection that the surrenders did not specify the estates to be *at will*; that circumstance not being necessary to be stated in a surrender, whatever it might be in an admission. That in the suits between the lords and tenants, of which evidence had been given on the plaintiff's part, it did not appear to have ever been a question whether their tenements were of *freehold or copyhold tenure*; but merely whether they were of *inheritance* or not, and what were the fines and services to which they were liable; to which alone the alteration in the copies, complained of in some of the proceedings, seemed to refer. That the language of the tenants themselves in those proceedings, where they described their tenure, seemed to import a mere *copyhold tenure*; as they uniformly styled themselves *copyholders*; and *copyholders of inheritance*, without any qualification, or without any intimation of a *freehold* interest: and that in his opinion the evidence upon the whole preponderated much in favour of the defendant; for whom the jury found their verdict.

A rule was obtained in *Michaelmas* term last, for a new trial, which came on to be heard in *Easter* term last, when *Cockell, Serjt. Wood, and Raine*, were to have opposed the rule; but the Court desired to hear the counsel in support of it.

Park, Topping, and *Hobroyd*, argued in support of the rule, that the weight of evidences shewed that the freehold of these customary estates, and consequently the soil under the surface, was in the tenant and not in the lord. That it appeared from the various documents proved, that encroachments had been continually making by the lord's stewards upon the tenants. And that however the admittances, which were the acts of the lord, and framed by his officers, stated during some periods the tenants to hold *at the will of the lord*, yet that the surrenders, to which the admittances were merely consequential, Co. Cop. s. 41, and *Roe v. Griffiths*, 4 Burr. 1961, all expressed the holding to be either according to the custom of husbandry of the manor, or simply according to the custom of the manor: omitting the words *at the will of the lord*: and that the same appeared by the Exchequer decrees of the 19th of Eliz. and of the 8 Jac. 1, and 12 Jac. 1, and the presentment of the customs of the manor in the 2 Jac. 2; shewing that, though sometimes called *copyhold* or *customary*

tenants, as evidencing their titles by *copy of court-roll*; yet that their services were of a *military* nature, viz. *border service*, and the *defence of Tynemouth castle*; that their *finés* were *certain* and that they held *estates of inheritance*; all which are *indicia* of a *free* and not of a *base* tenure. And they relied principally upon the case of *Gale v. Noble*,^(a) where it was resolved that lands, parcel of a manor, and passing by surrender and copy of court-roll, were yet *not copyhold*, but *customary freehold*; because it did not appear in any of the rolls or copies produced that they were granted *ad voluntatem domini manerii*, but only *tenendum secundum consuetudinem manerii*; and that two in a case where all the tenants had before constantly taken their estates to be *copyhold*; by which must be understood that they had called them *copyholds*. And by Lord Hardwicke, C. in *Hussey v. Grills*, Amb. 301, customary freeholds and copyholds differ extremely in their nature; the latter are of a *base* nature, which customary freeholds never were. And they also said, that it had been admitted at the trial that Mr. Grey, the plaintiff's landlord, had built his present house in *Backworth* with stone which he had gotten there. And that as to coal, there was no proof that either party had before gotten any there.

The case stood over for want of further time till this term, when

Lord ELLENBOROUGH, C. J. (without hearing counsel against the rule) delivered the opinion of the Court. After stating the pleadings, and that the real parties to the cause were Mr. Grey of *Backworth* on the part of the plaintiff, a tenant of the manor of *Tynemouth*, and the Duke of *Northumberland*, lord of the manor, on the part of the defendant; and that the question between them was, whether the soil and freehold were in the tenant, or whether the tenure were not copyhold, or in the nature of copyhold; and the freehold in the lord; he proceeded to state and comment upon the evidence reported by the learned Judge who tried the cause. And, first, as to the evidence adduced by the defendant: it appears by a copy of the enrolment of letters patent, 9 Car. 1, that the Crown granted the manor of *Tynemouthshire*, formerly parcel of the possessions of the late monastery of *Tynemouth*, in fee to *Scriven and Eden*, with all its rights, members, and appurtenances: and in the description of the premises are mentioned "all those ten *tenements of husbandry* with their appurtenances in *Backworth*, then or late in the tenures and occupation of certain tenants by name; and there described to be holden "at the will of the lord." And the greater part of the tenements in the other districts are described in the same manner as "*tenements of husbandry at the will of the lord*." Next follow the conveyances in the same year by *Scriven and Eden* to *Taylor and Cartwright*, with an exception of the mines and veins of coals in certain districts: and in 1640, *Taylor and Cartwright* conveyed to *Algernon Earl of Northumberland*, with a further exception of a coal mine in another district, which the Earl and the bargainors had conveyed away. The next piece of evidence is an examined copy of the *ministers' accounts* for the monastery of *Tynemouth* in the 30th and 31st of Hen. 8, where in an account of the collector of the rents in *Backworth* under the head of "*husbandry rents*," the tenements out of which the rents issue are described as holden, "at the will of the lord." This is followed by an entry from the rolls of the manor of a presentment of a surrender in 1663 to Mr. Grey's ancestor of a *customary tenement* in *Backworth*, and a grant thereof by the lord, *habendum* to Grey and his heirs "at the will of the lord, according to the custom of the manor." And a similar description runs through all the other admissions in 1677, 1679, 1687, 1771, and 1777; the *habendum* in each being "at the will of the lord according to the custom of husbandry of the manor," or "at the will of the lord according to the custom of the manor." And this evidence not only applies to the usual manner of admittance of the tenants of the manor, but

(a) Carth. 432. This and all the leading cases on the subject are collected in the case of *Roe d. Conolly v. Vernon*, 5 East, 61, and *Doe v. Davvers*, ante, 290, which were referred to.

also in particular to the admission of Mr. Grey and those under whom he claims. It was also proved on the part of the lord of the manor, that there was no instance of a copyholder boring for coals under his own copyhold. And on the contrary, the counterpart of a lease in 1700 was proved, whereby the then lord of the manor demised *all the coal-mines and veins of coal under all the lands* in the township of *Whitley* (one of the townships of the same manor) at a rent for 21 years. And also counterparts of other leases of the same sort, in different townships, one of them as old as 1684; and from thence down to a recent period; sometimes leasing coals and sometimes lime quarries, and extending in general terms to all other mines under the surface. This is the general result of the evidence given for the defendant; and it not only proves that by the original grant from the Crown, and of those through whom the Duke claims, that these estates were holden *at the will of the lord*, according to the custom of husbandry of the manor, or according to the custom of the manor; but it appears also from the ministers' accounts from Mich. 30 to Mich. 31 Hen. 8, (which are near 40 years older than the oldest date on the other side; the first admission produced on the part of the plaintiff, in which the words *at the will of the lord* are omitted, being the 17th of Eliz.) that the tenements were holden *at the will of the lord* at that period; only it omits the description "*according to the custom of husbandry*;" describing the rents, however, under the head of *husbandry rents*.

On the part of Mr. Grey, it was contended, that these estates are not copyhold *at the will of the lord*, but that they are freehold or of the nature of freehold, though passing by surrender and copy of court-roll. And the case of *Gale v. Noble* has been relied on in support of that argument. That case is only reported in Carthew (432), and there the lands were said not to be copyhold, because it did not appear in any of the rolls or copies produced that they were granted *ad voluntatem domini*, but only *secundum consuetudinem manerii*. Without impugning the authority of that case, and which it is not at all necessary to do for the decision at present, if it had appeared here that there was no evidence of any admissions to hold *at the will of the lord*, that case might have applied; though I am rather disposed to think that the general form of admissions, *according to the custom of the manor*, may be explained and qualified by the usage in such a manner as to shew that the freehold is in the lord: and what the usage was in that case does not appear by the report. But at any rate, this case does not range itself under that of *Gale v. Noble*; for here the admissions are, during a long period, uniformly to hold *at the will of the lord*. Coke's Copyholder, s. 41, was also referred to, in order to shew that the surrender is the important act, from whence the nature of the tenure is to be collected, and that the admittance must follow it, or it is void. But the terms of the surrender only point out to whom and for what estate the land is meant to be transferred by the tenant making such surrender, but cannot alter or vary the terms of the tenure itself; and therefore, says Lord Coke, if there be any variance between the admittance and the surrender, either in the person, in the estate, or in the tenure, or in any other collateral points, the lord doth only transfer an estate according to the surrender and his authority, *if it can take such effect*. And he instances, if a surrender be made to *J. S.* the lord cannot admit *J. N.*; but such admittance is wholly void. If there be a surrender to *J. S.* for life, and the lord admit him in fee, only an estate for life passes. So if a surrender be to one upon condition, and the lord admit absolutely, it is void: or if the surrender be absolute, and the admittance conditional, the condition is void. On the other hand, it appears that a surrender cannot vary the custom of the manor any more than an admittance: but both the lord and the tenant are equally bound by the custom. Then in order to prove what is the custom of this manor in this respect, the plaintiff gave in evidence a copy of an Exchequer decree in the 19th of Eliz. in a cause of *Milbank and Others v. Dallaval and Others*; wherein the plaintiffs state

themselves and their ancestors to have been immemorially seised of tenements in *Backworth*, and six other townships in the manor, holden by *copy of court-roll according to the custom of the manor, paying rent, and doing border service, and defending Tynemouth castle from invasion*. This is the only part which affects this question, as a statement of their tenure; for the rest of the decree merely concerns a dispute as to the render of a corn-tax by *Winchester* or *Newcastle* measure. Then follows another decree in the 8 Jac. 1, which recites that the king's customary and copyhold tenants in *Backworth* and other townships of the manor had petitioned the king, *affirming* that they were *copyholders of inheritance*; and that there were immemorial customs within the manor for payment of *fincs for admittances* to the said *copyhold* tenements, holden by copy of court-rolls *secundum consuetudinem* HUSBANDRIÆ of the said manor, upon descent, surrender, and alienation: that their *fincs* were *certain*; and praying relief for wrongs done, &c. It is apparent from the whole of the decrees (which his lordship read, referring particularly to those parts in italics) that the whole dispute was, whether the tenants held *estates of inheritance*, and upon *fincs certain*; but it is no where suggested throughout all the proceedings that they had a *freehold* tenure. The decree affirms them to be *copyholders of inheritance* with *fincs certain*. And where the word *freehold* (estates of *freehold* or inheritance) occurs once (and but once) in that decree, as applied to the estate of the tenants, it is plain from the whole context that it is used in speaking of freehold interests, in contradistinction to chattel estates, for terms of years: and there is no incongruity in such use of the word; for a person may well have a *freehold interest* in a *copyhold* tenement. That decree speaks of a reference from the king to the lord high treasurer, chancellor, and barons of the Exchequer, on which they decreed, &c. which refers to a stat. of the 7 Jac. 1. c. 21, (a) under the authority of which the reference was made, and which statute seems to have gone to the extreme limit of the powers of legislation itself, and almost beyond them; for it confirms and establishes as copyholds all lands, &c. decreed to be such in the Court of Exchequer chamber or Duchy, during *three years next after the first day of that session of parliament* according to the customs of the

(a) 7 Jac. 1. c. 21. An act for confirmation of decrees hereafter to be made in the Exchequer Chamber and Duchy Court, concerning customary or copyhold lands and tenements. Reciting that there had been much question and exception about lands held by copy of Court-roll, because either not originally parcel of a manor, nor strictly from time whereof, &c. demised and demisable by copy of Court-roll of the said manors; or because *fincs* payable for admittances upon, &c. and their uses, customs, liberties, and privileges, are either uncertain, or not so plain but both for the present and in future times much trouble, loss, and disquiet may arise, &c. and may be a discouragement to the tenants in their endeavours in improving and husbanding their said lands; and that his Majesty minding, &c. to settle and secure their copyhold estates according to the true meaning, &c. had been pleased that the Lord Treasurer and the Chancellor of the Courts of Exchequer and Duchy should take order upon reasonable compositions, &c. to establish their said copyhold estates by decrees of their said several Courts, respectively, according to the true meaning, &c.; in performance of which his Majesty's directions divers decrees had been made, and others are intended to be made: it enacts, that all the messuages, cottages, lands, tenements, and hereditaments, contained or mentioned in any decree or decrees to be made in any of the said Courts of Exchequer Chamber or Duchy, at any time since the first day of this session of parliament, or within three years from hence next ensuing, upon compositions made, &c. with his Highness's officers on his behalf as aforesaid, and in and by the same (i. e. Courts) decreed to be from thenceforth good and perfect copyhold lands, *shall, from the time of such decree or decrees made, be taken and adjudged to be good and perfect copyhold lands, tenements, and hereditaments, according to the true intent and meaning of the said decrees respectively*. And that all persons may have and enjoy the said lands, &c. to them, their heirs and assigns, for ever, by *copy of Court-roll*, or otherwise, according to the purport and effect of the said decrees; by such *fincs, rents, duties*, and by and with and according to such customs, provisions, liberties, profits, and commodities, and in such manner and form as in and by the said decrees shall be limited and appointed. And it provides, that the decrees shall be as binding as if specially inserted in the act, &c.

said manors severally and respectively, "according to the purport and effect of such decrees, by such fines, rents, and duties, and by, with, and according to such customs, privileges, liberties, profits, and commodities, and in such manner and form as in and by the said decrees should be limited and appointed." This statute is to be found in Rastall's edition of the Statutes, but is omitted in the common editions of the Statutes. The next piece of evidence is an order of the Court of Exchequer in *Easter*, 12 Jac. 1, which reciting part of the former decree relating to the forms of the copies, and that the Earl of Northumberland had certified the accustomed form of a copy for such tenants as were admitted after death, directs such form to stand for a precedent in future: and in that form the *habendum* is to the tenant and his heirs *secundum consuetudinem husbandrie manerii*, omitting *ad voluntatem domini*. At any rate, it may be observed of this order or decree, that it was made out of time, and of course not within the authority of the statute, being made beyond the three years limited by the statute for that purpose. Upon this, however, it is contended, that (assuming the decree to be effectual,) inasmuch as it shews that the tenants held their estates according to the custom of husbandry of the manor only, without stating at the will of the lord, it follows from the doctrine laid down in the case of *Gale v. Noble*, that they had a freehold tenure. That argument, however, assumes that a holding according to the custom of husbandry of the manor must be taken to imply negatively, that it is not according to the will of the lord. But where reference is made to the custom generally, what that custom is in all its parts is to be collected from evidence of usage, i. e. from what has in fact been the custom acted upon. The words "according to the custom of husbandry of the manor" may have different interpretations. They may, though not properly for the present purpose, refer to a known course of husbandry in the manor regulating the culture of the tenants' estates; or they may mean that the tenants hold as husbandmen of the lord, in like manner as the villeins of the lord formerly were employed in the culture of the lord's lands, and as distinguished from an holding by military services properly so called, &c. &c. That the tenants held according to the custom of husbandry of the manor, whatever that custom was, is also proved by various copies of admissions beginning in the 17 Eliz. (prior in point of time to those produced by the defendant, in which "at the will of the lord" occur,) though some others state it generally according to the custom of the manor. These are followed up by a petition to Algonoon Earl of Northumberland, complaining of the tenants' copies and customs having been altered, and their fines increased, on pretence of their having divided without licence; all which are referred; but as nothing came of the reference, it is immaterial to dwell upon it. Likewise an inquisition in the 2 Jac. 2, for ascertaining what were the customs of the manor, and the duties, rents, and services, payable to the lord by the tenants for their copyhold farms; in which it is found by the jury charged with the inquiry, that all the copyhold estates within the manor were copyhold estates of inheritance, according to the custom of the manor. That the widow of a copyholder dying seised shall enjoy the copyhold estate during widowhood, without any fine for admittance. That the eldest son of a copyholder, succeeding by descent, shall pay 40s. fine on admittance for a whole farm; and so in proportion for a half or quarter farm. But an eldest daughter taking in default of sons shall pay 4l. for a whole farm, and take only for life. This increase of fine, on admittance of the daughter, who takes only a life estate, seems to have arisen from her inability to perform the border service. There is also a custom stated for the tenants to lease their copyhold lands by indenture for three years, without licence; but if leased for 20 or 21 years, then they must have a licence, and pay the steward's fee. There are also several other findings: but it is to be observed, that none of them state or suggest any right or claim on the part of the tenants to the freehold of their

tenements. It was however, proved, that upon examination of the book of surrenders, the surrenders all appear to have been to the use of the surrenderees, either *according to the custom of the manor* or *according to the custom of husbandry of the manor*, and that there is no instance of a surrender to hold *at the will of the lord*. And this latter circumstance, upon the effect of which I have in part observed already, is the only evidence which avails the argument of the plaintiff, founded on the case of *Gale v. Noble*, that where the tenant holds *according to the custom of the manor* generally, without stating *at the will of the lord*, an intendment is to be made that the freehold is in the tenant. What the evidence of the custom in fact was in that case does not appear from the report, but merely, that in none of the rolls and copies was the holding stated to be *at the will of the lord*. Neither does it appear here by the evidence what the *custom of husbandry* is in this case. But in none of the various proceedings given in evidence in this case does it appear that there ever was any claim made by the tenants to the freehold of their tenements; the only claim insisted upon by them is, that they were *copyholders of inheritance at fines certain, &c.* But as to the freehold, the evidence of usage, which is of the utmost weight in cases of this sort, is, as far as it goes, wholly on the side of the lord. For there is no evidence that the tenants have ever gotten coal under their own lands, but the evidence uniformly is, that the whole of the coal gotten has been gotten in right of the lord by his lessees, &c. It is too much, therefore, to say, that there ought to be a new trial as in case of a verdict against evidence, or indeed that the evidence does not in this case greatly preponderate in favour of the verdict: though if it only stood in equal scales, there would be no occasion to disturb this verdict, which appears to have been given to the satisfaction of the learned Judge who tried the cause.

Rule discharged.

Starey v. Barns.

7 East, 435. June 7, 1806.

The drawer of a bill of exchange, which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate: inasmuch as such debt is made proveable under his commission by the statute 7 G. 1. c. 31.

IN an action by the indorsee of a bill of exchange against the drawer, the plaintiff declared, that the defendant on the 15th of September 1801, according to the usage and custom of merchants, drew a bill of exchange of that date on *J. Gardner of London*, requiring him two months after date to pay to his, the defendant's order, 100*l.* value received; which bill *J. Gardner*, on the same day and year, accepted: that the defendant before the time appointed for the payment thereof indorsed it to *J. Warwick*, or order, who before it was due indorsed it to the plaintiff: and that afterwards when it became due, on the 18th of November 1801, it was presented to *J. Gardner* for payment, who on request refused to pay the same, and made default: of all which premises the defendant afterwards, on the 21st of November 1801, at *London*, had notice, &c., by reason whereof, &c. The second count charged, that the like bill drawn by the defendant on *J. Gardner*, and made payable to the defendant, or his order, was accepted by *Gardner*, and afterwards, and before it became due, was indorsed by the defendant to the order of the plaintiff, and by the plaintiff to *Moses Gardner*; and that afterwards when the bill became due, on the 18th of November 1801, it was presented for payment to *J. Gardner*, who refused payment and made default: and thereupon the bill was returned to the plaintiff, who was afterwards, on the 25th of March 1802, obliged to pay the same: of all which premises the defendant, on the said 25th of March, had

notice, &c. There were also the common money counts. The only plea was, that the defendant, before the exhibiting of the plaintiff's bill, viz. on the 6th of *November* 1801, became a bankrupt, and that the several causes of action in the declaration mentioned accrued to the plaintiff before the defendant's bankruptcy; on which issue was joined. At the trial before Lord *Ellenborough*, C. J. at the sittings after last *Michaelmas* term at *Guildhall*, the facts stated in the declaration standing admitted, it was proved in support of the defendant's plea (upon which alone the question arose) that a commission of bankrupt issued against the defendant and *J. Gardner* on the 6th of *November* 1801, and that their certificate was allowed on the 24th of *March* 1802; and it was thereupon contended that the debt was barred. But a distinction being taken between this case, where the bill having been accepted the drawer only became contingently liable in default of the acceptor, which default was not made till after the bankruptcy, and consequently no debt due from the drawer before; and prior cases which had been decided, where, the bill being refused acceptance, the drawer became immediately liable; Lord *Ellenborough* directed a verdict to be found for the plaintiff for 120*l.*, the amount of the bill and interest, with liberty to the defendant to move to set it aside, and enter a nonsuit, if the Court should be of opinion that the debt was barred by the defendant's certificate. A rule nisi was accordingly obtained for this purpose in *Hilary* term last, which was grounded, principally upon the authority of *Macarty v. Barrow*,^(a) where it is said that the drawing of a bill creates a debt; and other cases were referred to as *Cowley v. Dunlop*, 7 Term Rep. 565; *Rolfe v. Castan*, 2 H. Blac. 570; *Francis v. Rucker*, Amb. 672, and *Ex parte Adney*, Cowp. 460.

Park and *Wigley* now shewed cause against the rule; and relied upon the distinction, arising out of the cases decided; between bills accepted and not accepted at the time of the drawer's bankruptcy. There is an implied engagement by the drawer of a bill to the person in whose favour it is drawn, that the drawee will accept it; and if it be dishonoured, it may be considered as referring the holder to his original present debt against the drawer, which is evidenced by the bill; the implied consideration having failed on which he

(a) 2 Stra. 949, and 3 Wils. 16, and 2 Barnard. 251. 5.

The following note of this case is from Mr. Ford's MS. vid. ante, 347.

Macarty against *Barrow*, E. 6. G. 2, B. R. The defendant, in the month of *December*, and till the 6th of *January* 1728, drew bills of exchange upon *Messrs. Parmenter* and other merchants at *Bilboa*, payable at a future day; and upon the 13th of *January* in the same year, a commission of bankrupt issued out against him, on which he was found a bankrupt; and in *February* and *March* following the bills were returned to *England*, protested for non-acceptance; upon which the defendant was arrested, and sued to execution; and having now obtained his certificate, *Foulkes* moved that he might be discharged in pursuance of the act 5 Geo. 2. c. 30, whereby the benefit of the act 5 Geo. 1. c. 24, is conveyed to bankrupts obtaining a certificate, (viz.) to be discharged by the Court that issues the process from all actions founded upon any debt contracted before an act of bankruptcy committed. And although *Strange* for the plaintiff urged, that it did not appear when the defendant first became a bankrupt, and that he was not chargeable upon the said bills of exchange before they had been refused acceptance by the drawee, and had been protested, or at least before the day of payment, which was not till after the going out of the commission of bankrupt; yet the Court resolved that he should be taken to be a bankrupt the day the commission was executed, and that they could not intend he was a bankrupt sooner; but if the plaintiff would suppose he was, the fact ought to be shewn by him. And as to the objection, that the defendant had not contracted any debt before the protest; they resolved that a debt was created immediately upon drawing the bills, before the day of payment, or any protest made; the money to be received upon the bills being debtum in present, though solvendum in futuro; and that the protest did not raise any debt, but was only notice to the drawer of the drawee's refusal to pay the bill.

Lee, Justice, said, that the 7 Geo. 1. c. 31, which enables persons who have securities for money payable at a future day to come in under the commission, extends to all sorts of securities given upon a good consideration, though the money did not become due for goods sold to the defendant, as was urged by *Strange* that it ought.

agreed to receive a bill payable at a future time.(a) But it is otherwise where the bill is accepted; for then the original debt is merged, and the only remedy of the holder, even against the drawer, is upon the bill, by which a new contract between them is created, and no present debt exists; but only a future contingent liability, in case the acceptor shall make default on the stipulated day of payment. Then the bankruptcy of the drawer having happened before that day arrived, the bill could not be proved under his commission: for there was then no *debitum in presenti solvendum in futuro*; but it was altogether contingent whether the bankrupt would ever be indebted at all or not. And the stat. 7 Geo. 1. c. 81, which enables persons holding securities for money payable at a future day certain to come in under the commission, extends only to debts which are certainly due from the bankrupt at such future day. The case of *Macarty v. Barrow* was where bills drawn upon Spain, by the defendant before his bankruptcy were returned protested for non-acceptance; therefore the then present debt which was raised by his drawing before the bankruptcy never became contingent. For it has been decided(b) that the drawer is liable immediately on the non-acceptance of the drawee, though the time for which the bill was drawn be not elapsed. *Relfe v. Caston*, 2 H. Blac. 570, and *Croley v. Dunlop*,(c) were both cases of counter-acceptances. In the latter the Court were divided in opinion on the question whether such exchange of paper created a present existing debt which might be proved under the commission.

Sir V. Gibbs (and *Marrgat* was with him) in support of the rule, contended that immediately upon the drawing of a bill a debt is raised from the drawer, which continues till satisfaction of the bill, although it cannot be enforced against him until default made by the acceptor; and then the drawer is answerable with a retrospect as from the time of the bill drawn. And he relied upon the principle of the case of *Macarty v. Barrow*; which, though the case of a bill protested for non-acceptance, was decided upon the ground, as stated in the more correct report of it in *Wilson* from the note of Lord C. J. *Wilmut*, "that the drawer of a bill of exchange instantly upon his drawing the bill contracts a debt." Whether the bills in that case were refused acceptance before the bankruptcy of the drawer does not appear by the report; though the argument of *Strange*, who was counsel for the plaintiff, leaves room to infer that the non-acceptance was after the bankruptcy; which would assimilate the cases very nearly: for till the dishonour it could not be told whether the drawer would ever be liable to be sued upon the bill; and yet he was holden entitled to be discharged under his certificate. And it is clear from what was said by Lord Chancellor in the case *Ex parte Harrison*, 2 Bro. Ch. Cas. 615, that he considered that the holder of a bill might prove his debt under the commission of the indorser, though the bill did not become due till after the bankruptcy. He was then stopped by the Court.

Lord ELLENBOROUGH, C. J. Upon referring to the act of the 7 Geo. 1. c. 81, I think the plain letter of it is decisive of this question, without going upon any other more uncertain ground. With all the respect which I feel for the opinion delivered in *Macarty v. Barrow*, that the mere drawing of a bill upon another payable at a future time creates a present debt from the drawer, recognized as it was by Lord C. J. *Wilmut* in *Chilton v. Whiffin*, I should have doubted whether the giving a credit upon another person at a future time, whereby the drawer virtually agrees that if the drawee do not accept the bill, he will pay it, constituted any thing else than a contingent future liability in the drawer upon the default of the drawee. However, I feel myself relieved from any difficulty on the subject upon the plain ground that the defendant is

(a) Vid. *Milford v. Mayor*, Dougl. 54.

(b) *Milford v. Mayor*, Dougl. 54, and *Bellingall v. Gloster*, 3 East, 491.

(c) 7 Term Rep. 565, and vide *Duckler v. Buttivant*, 3 East, 72. *Hovils v. Baxter*, ib. 177, and *ex parte Marshall*, 1 Atk. 129.

entitled to his discharge under the statute. After reciting that traders were often obliged to dispose of their goods on credit, and to take bills, &c. payable on future days, and that the buyers becoming bankrupts before the money upon such securities became payable it had been a question, whether such persons giving such credit on such security should be let in to prove their debts before such securities became payable: for remedy it enacts, that "Every person who shall give credit on such securities as aforesaid" (here credit was given by the party on such a security) "to any person who shall become a bankrupt," (that is the case here,) "upon good and valuable consideration for any sum of money, or other matter or thing whatsoever," (an exchange of securities is a good consideration according to *Cowley v. Dunlop*, and other cases,) "which shall not be due or payable at or before the time of such person's becoming bankrupt," (that is the fact of this case,) "shall be admitted to prove their respective bills, &c. in like manner as if they were made payable presently, and not at a future day." In every respect, therefore, the circumstances of this case tally with the description in the statute. Without, therefore, admitting the principle that the drawing of such a bill constitutes a *debitum in presenti*, it is sufficient to say, that by the express words of the statute the debt was proveable under the defendant's commission, and therefore he is discharged by his certificate.

GROSE, J. declared his concurrence on the ground of the statute. But observed also, that he should hesitate long before he decided against the doctrine laid down in *Macarty v. Barrow*, which had been often recognized since, that the drawing of a bill of exchange constituted a *debitum in presenti* from the drawer, though *solvendum in futuro*.

Per Curiam,

Rule absolute for entering a nonsuit.

Sutton v. Wheeley.

7 East, 442. June 9, 1806.

A devisee for life of an estate, part of which was a brick ground, making bricks there for sale generally, with a view to profit, is not a trader within the bankrupt laws, though he purchased the coals and some of the wood used in burning the bricks; and had occupied the same ground as a brick-maker for general sale, before the estate came to him by devise; for this is but a more beneficial mode of enjoying his own estate, by carrying the soil to market in an ameliorated state, and is not a buying of any commodity to sell it again; nor does it fall within the principle of the bankrupt laws, which were levelled against those who, getting other men's goods into their hands, obtain credit upon and consume the same.

THIS was a feigned issue, directed by the Lord Chancellor on a petition in the matter of the defendant's bankruptcy, to try the question whether the defendant had been a trader within the bankrupt laws at any time between the 26th of September 1796 and the 1st of January 1803, the plaintiff in such issue asserting the affirmative. The cause was tried at the last assizes for Essex, before Heath, J., when a verdict was found for the plaintiff, subject to the opinion of the Court on the following case.

The defendant in the year 1795, his name being then *John Marsh*, and then residing at *Weeleigh* in Essex, opened, and entered with the excise officer of the district in which he resided, a public kiln, as a brickmaker, in his then name of *John Marsh*. When he so opened the kiln he had no interest in the estate from which the brick earth was dug, the same being the property of one *Samuel Weeley*: and the defendant there carried on the brick-making business until the death of *Weeley* on the 17th of September 1796. Immediately after *S. Weeley's* death, the defendant entered into possession of the estate, on a part of which the said brick-kiln was erected, and from which the brick-earth

had been procured, as devisee thereof, for the term of his own life, for his own use and benefit, under the will of *S. Weeley*, subject to the incumbrances; and the defendant continued in possession as tenant for life until the issuing of the commission of bankrupt against him on the 16th of *January* 1804. The annual value of the estate and manor was at *S. Weeley's* death 750*l.* per annum, the greatest part of it then and still being underlet to tenants; and the whole is subject to incumbrances to the amount of 230*l.* per annum, and consists of about 900 acres. Immediately after *S. Weeley's* death the defendant re-entered the same kiln at the excise-office in his then name of *John Weeley*; and his kiln was surveyed every 14 days by the surveying officer of the district from its first entry in 1795 until *July* 1799. It was a large and capital kiln, capable of burning 30,000 bricks at a time, and during all the above period was kept by the defendant for the general sale of bricks and tiles to any purchaser; and bricks and tiles were sold there to any person who came to buy them, and that in great quantities, with a view to profit; the defendant usually employing seven or eight workmen at his kiln, who made the bricks at a certain price per thousand. During the above period the defendant yearly made from 150 to 200,000 bricks, and a great number of tiles, part of which were during that period used by him in repairs on the said estate, and in building a cottage on the brick ground for the foreman to live in, and a piggery and other buildings on the said estate: but the greater proportion thereof were sold to customers in general: and during that period the defendant at various times solicited custom from several persons to purchase bricks and tiles from him at the said kiln, and he exchanged bricks and tiles with one person for coals. On the 30th of *January* 1796, the defendant inserted an advertisement in the *Ipswich Journal*, addressed to tile-makers, for a tile-maker; and stated therein that a good hand might have constant employ in an extensive vein of capital earth. And in *July* following, he inserted another advertisement, addressed to brick and tile-makers, for a person who was a complete master of the business of making chimney-pots, glazing tiles, &c. to undertake the management of a brick-kiln where there was an extensive vein of excellent brick and tile earth for red ware only. He thereupon procured one *Cook* as a foreman, to whom he represented at the time of engaging him that he should burn from 5 to 600,000 bricks a year for sale. *Cook* from the beginning of 1796 superintended the brick-making business, until *July* 1799, when the defendant entirely gave up brick-making; from which time *Cook* and *G. Marsh* (the defendant's brother) hired the brick-kiln and premises of the defendant, and carried on the brick-making business therein, on their own account, for some time; after which the defendant let the premises to *J. Majoram*, who still continues to carry on the brick-making business therein. The defendant, from the first opening of the brick-kiln in 1795, until the death of *S. Weeley*, and afterwards until he left off brick-making in *July* 1799, carried on without interruption the manufacturing and selling of bricks and tiles at the said kiln, in the same manner, and with the same view to profit. The coals, and some of the wood used in burning the bricks, were bought of two or three different persons; but some of the wood, and all the brick earth, straw, and sand, used in the brick-making, were procured and raised as aforesaid by *John Weeley* from different parts of the estate, and not bought. And the brick earth, straw, wood, and sand, procured and raised from the estate, so first belonging to *S. Weeley*, and afterwards to the defendant himself, for his life, subject as aforesaid, during the above period, and used in making the bricks and tiles from the time when the defendant first commenced the brick-making business until he declined it, upon an average formed less than a fifth part of the expence of the coals and wood purchased for the manufacturing such bricks and tiles, and the labour employed in rendering them saleable at the kiln, including the excise duty to be paid upon the same. The question for the opinion of the Court was, if the defendant were

a trader between the days stated? If he were, then the verdict to stand: if not, then a nonsuit to be entered.

The case was argued in last *Hilary* term, by *Pooley* for the plaintiff, and *Wetherell* for the defendant. The general point whether a person renting or otherwise acquiring brick-ground, for the purpose of making bricks for general sale, be a trader within the bankrupt laws, having been several times before much discussed in the cases *ex parte Harrison* (a) in Chancery, and *Parker v. Wells, C. B.* (b) *B. R.*, 1 Term Rep. 34, and *Dom. Proc.* (c) where all the cases bearing upon this question are collected, it is unnecessary to detail the arguments, especially as the Court, in giving judgment, noticed such of them as appeared to throw any new light upon the subject. The Court, at the time of the argument, intimated their opinion very strongly against the bringing a person circumstanced as the defendant within the scope of the bankrupt laws; but said, in answer to an intimation that gentlemen had taken notes for a second argument, that the case had been so fully and ably discussed already, that nothing more could be said upon it: and that they would deliver their opinion after they had conferred together upon it. No opportunity occurred for doing this during *Easter* term, the greater part of which was occupied by the trial of lord Viscount *Melville*, in the great hall. And now the opinion of the Court was delivered by

LORD ELLENBOROUGH, C. J. This case is, as was contended by the defendant's counsel in his argument, distinguishable from the case of *ex parte Harrison*, in which Lord *Thurlow* refused a new trial; where a brick-maker having taken earth from the waste, and having made a compensation on that account to the lord, was found by the jury to be a trader; and from that of *Wells* and *Parker*, in which the opinions of the King's Bench and Common Pleas differed, and on which, in the House of Lords, there was ultimately no decision; inasmuch as in both those cases the earth employed in making bricks was acquired for that very purpose: and it is not necessary to say what would be our opinion if a case similarly circumstanced to the one or the other should come before us. In the present case, *Weesley*, by devise, took a freehold interest in the brick earth, and can in no way be considered as buying any thing, which he sold again; but like a burner of his own chalk or rock into lime, the smelter from his own mines of iron or lead ore into pigs, or the manufacturer of his own rock into allum, appears to have merely carried his own soil to market in some way manufactured. What reason then is there that he should be holden a trader more than the several other venders of their own manufactured soil already mentioned. It can make no difference that in this case the manufactured soil was clay, in the others, rock of various sorts, or chalk. In order to smelt and flux iron and lead considerable quantities of fuel and some ingredients are necessary: so too in order to make rock allum into merchantable allum. And for making clay into bricks no greater variety of additional articles is required than is required for manufacturing and rendering the particular subjects saleable in the foregoing instances. In the several cases of the lime-burner, the smelter of ore, and the maker of allum, although the surface of the earth might produce some profit, yet the selling the soil under such surface, or parts of such soil, in a state essentially altered by various processes of manufacture, has been holden not to alter the character of the land-owner, nor to convert him into a person who can be properly said to carry on the trade of merchandize. The principle of the bankrupt laws, as it is to be found in the statute of Hen. 8, referred to in the argument by the defendant's counsel, is to prevent persons craftily obtaining into their hands great substance of other men's goods, and at their own wills and plea-

(a) 1 Bro. Ch. Cas. 173, and Cooke's Bankrupt Laws, 38, 5th edit.

(b) Cooke's Bankrupt L. 41, &c. and Montague's Bkt. L. app. 97.

(c) 1 Term Rep. 783. Cooke and Montague, ib., and 1 Tomlin's Dig. of Parlt. Cas. 545.

tures consuming the substance obtained by credit of other men : and the subsequent statutes relating to bankrupts were made for the better providing against the persons described by that statute, and, for the more accurately defining who ought to be taken to be a bankrupt : in no one of which is there any term made use of which is not descriptive of persons to whom in the actual course of their business extensive credit is given, and that for the very purpose of carrying it on. And where particular employments are not specified, such as that of a scrivener, the general description cannot be satisfied without there be *both a buying and selling* : this is implied in the words *using the trade of merchandize* : for a merchant is so denominated from his being a *buyer to sell again* ; but one, who burns into bricks the clay of the land of which he is seised as devisee, and then sells the bricks so made, is no buyer of any thing to sell again ; nor is he one the course of whose business requires that he should obtain great substance of other men's goods upon credit. And it is always to be remembered, that it is the protection of persons who have so given credit which is the professed object of the bankrupt laws. (1)

Judgment of *Nonsuit*
to be entered.

Lubbock and Another v. Potts.

7 East, 449. June 9, 1806.

Colonial produce cannot legally be shipped from the *British West-Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage ; and it matters not that part of the cargo was shipped at one of the *West-India* islands, with liberty to exchange it at another, (which would have been legal) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back.

THIS was an action on a policy of insurance upon the ship *Speedwell* and cargo, "at and from *Trinidad* to *Gibraltar*, with liberty to touch, stay, and trade, load, unload, and reload, shift, and exchange property at all or any of the *West-India* islands, particularly *Martinique* ; the insurance to continue upon the ship until she should arrive at *Gibraltar* and have moored at anchor 24 hours in good safety ; and upon the goods from the loading thereof until the same should arrive at *Gibraltar*, and be there discharged : at a premium of 20 guineas per cent., to return 10l. per cent. if the ship should have convoy for the voyage and arrive. The declaration, after setting forth the policy as above, dated 2d of *June* 1801, stated that afterwards, on the 3d of *June* 1801, the defendant, in consideration of a further premium of 5 guineas per cent., agreed that the said insurance should be "against all risks whatsoever, *British capture, seizure and detention included*." It then stated, that on the 1st of *May* 1801, the ship was in safety at *Trinidad*, and on the same day departed from thence on the voyage insured for *Martinique*, where she arrived on the 20th of *May* ; that on the 2d of *June* a large quantity of goods was there put on board to be carried from *Martinique* to *Gibraltar* ; and that the ship with the goods afterwards sailed from *Martinique* upon the voyage insured, but that before her arrival at *Gibraltar* she was lost by the perils of the seas.

At the trial before Lord *Ellenborough*, C. J. at the sittings after last *Trinity* term, the policy with the subsequent memorandum was proved : and it also appeared that the ship which went out from *Gibraltar* arrived at *Trinidad*, and afterwards sailed from thence to *Martinique* with some goods on board, but took in sugar and coffee, being the principal part of her cargo, at *Martinique* : both *Trinidad* and *Martinique* being at that time in the possession of

(1) Vide *Williams v. Stevens*, 2 Campb. 300.

the *British* by capture: and that immediately upon her arrival in the outer road of *Gibraltar* a sudden and violent squall of wind arose, in consequence of which she was driven upon the rocks and bulged. The plaintiff recovered a verdict; but two objections were reserved, upon which a rule nisi was obtained in *Michaelmas* term last for setting aside the verdict and entering a nonsuit: 1st, that the memorandum extending the insurance against *British capture, seizure, and detention*, vitiated the policy. 2d, That the trade insured, being colonial produce from the *British* colonies in the *West-Indies* to *Gibraltar*, was illegal by the navigation laws.

Sir *V. Gibbs*, and *Carr* now shewed cause; and upon the first point argued that the memorandum, however illegal, being made at a time subsequent to the making of the policy, would not affect it, but at most would only be void, and the case would stand as if no such memorandum had been made. But they also contended that the memorandum was legal; for that *British* property might through ignorance or wrong be seized, captured and detained, as well by *British* privateers as by the King's ships of war, and loss and damage would thereupon ensue, though the property were afterwards liberated; against which loss the assured might lawfully contract to be indemnified: and that if the words were capable of a construction which would make the insurance lawful, the Court would not intend them in any other sense. *The Court* seeming to coincide with the plaintiff's counsel on this point;

Park contra (with whom was *Marryat*) contended upon the authority of what was said in *Kellner v. Le Mesurier*, 4 East, 402, that an insurance against *British* capture, *eo nomine*, was illegal and void; and that the memorandum was incorporated with the policy by the terms of it, and made all one contract, which could not be severed. That *British* detainer includes an embargo by the King's authority, against which, though happening without any fault imputable to the owner of the goods, it would be unlawful to insure, *eo nomine*; because of the impolicy of creating an interest in any subject against the acts of our own government.

The Court observed, that what was said in *Kellner v. Le Mesurier* must be taken with reference to the subject matter; that being the case of a policy on a foreign ship, the general words of which were considered as not extending to insure the party against *British* capture in case of hostilities: (a) and they still seemed inclined to think, that construing the words of the memorandum in a favourable sense, as extending only to cover losses happening from unlawful capture, seizure, and detention by *British* ships; or even extending it to temporary lawful detention, without any fault of the assured: the memorandum would not vitiate the policy. However, without deciding this point, they called upon the plaintiff's counsel to answer the other objection.

Sir *V. Gibbs* and *Carr* contended, 2dly, that the voyage insured was legal. The island of *Trinidad* to which the ship first went, and *Martinique* where she afterwards shipped the colonial produce in question, were both at that time *West-India* colonies under the *British* government; and there is nothing in any of the navigation laws which prohibits *British* colonial produce from being carried to any other *English* plantation, such as *Gibraltar* must be considered to be, though situated in *Europe*. The stat. 12 Car. 2. c. 18. s. 1, enacts, that no goods shall be imported into or exported from any lands, islands, plantations, or territories belonging, or which may hereafter belong to or in the possession of the King, his heirs and successors, but in ships belonging to the people of *England* or *Ireland*, *Wales*, or *Berwick-upon-Tweed*. Then by s. 18, "No sugars, &c. of the growth, &c. of any *English* plantations in *America*, *Asia*, or *Africa*, shall be transported from any of the said *English* plantations to any land, island, territory, dominion, port, or place whatsoever, other than to such other *English* plantations as belong to his Majesty, &c. or to *England* or *Ireland*, *Wales*, or *Berwick-upon-Tweed*," on

(a) See also *Gamba v. Le Mesurier*, ib. 407.

pain of forfeiture, &c. Then by s. 19, ships sailing from *England, Ireland, Wales, or Berwick-upon-Tweed* shall give bond, that in case they shall load any of the said commodities at any of the said *English* plantations, they shall be landed at some port of *England, Ireland, Wales, or Berwick-upon-Tweed*: and for all ships coming from any other port or place to any of the aforesaid plantations, which by this act are permitted to trade there, bond shall be taken that such goods shall be carried to some other of his Majesty's *English* plantations, or to *England, Ireland, Wales, or Berwick-upon-Tweed*. This, they observed, was the principal act which directly regulated the intercourse between the mother country and its colonies, and between those several colonies; and the express object being to promote the shipping and navigation of *England*, that object was as well attained by promoting a free collateral intercourse between the several colonies, &c. in *English* ships, as by the direct intercourse between the respective colonies and the mother country. By s. 9, indeed of stat. 15 Car. 2. c. 7, a penalty is inflicted on custom house officers in *England, or Wales, or Berwick*, giving warrant to suffer any sugar, &c. the growth of the said colonies, &c. to be carried to any other country, until first unladen and put on shore in some port of *England, Wales or Berwick-upon-Tweed*. But this must be construed with reference to the former provision, and must apply to other countries than an *English* plantation. The same act, s. 6, provides, that no *European* commodity shall be imported into any plantation, &c. of his Majesty, &c. in *Asia, Africa, or America*, but what shall be shipped in *England, Wales, or Berwick-upon-Tweed* in *English* ships. But it is no where directly provided, that colonial produce may not be brought to any *English* colony, plantation, &c. in *Europe*, so as to exclude *Gibraltar*. Then the subsequent act of the 22 & 23 Car. 2. c. 26. s. 10 & 11, reciting the last-mentioned statute, and particularly the 6th section, and reciting further the prejudice to *England* by ships going with plantation produce to *Ireland*, (which it must be observed was, like *Scotland* before the Union, an independent kingdom, and having different revenue laws, though under the same sovereign) by means of bonds taken for the return of such ships to *Ireland* as well as *England, Wales, and Berwick*, under the general words of the stat. 12 Car. 2. c. 18. s. 19, it therefore directs that *Ireland* shall be left out of all such bonds taken from any ship sailing from *England, Ireland, Wales, or Berwick-upon-Tweed* for any *English* plantation in *America*: and directs, as before, "that in case the said ship shall load any of the said commodities at any of the said *English* plantations, they shall be brought to some port of *England or Wales, or to Berwick-upon-Tweed*, and shall there unload and put on shore the same. And in like manner for all ships coming from any other port or place to any of the aforesaid plantations, which by the said act are permitted to trade there, &c. bond shall be taken that such ship shall carry the said goods "to some other of his Majesty's *English* plantations, or to *England, Wales, or Berwick-upon-Tweed*," &c.: and then it gives a forfeiture for disobedience. It does not say, "to some other of his Majesty's *English* plantations" in *America, Asia, or Africa*. A plantation is not confined to settlements for raising produce, but in a general sense, as here used, means any place where a colony of men has been planted. And at any rate, the illegality of the transaction is made to depend upon the unloading and putting on shore colonial produce in a prohibited place, which was not the case here.

Lord ELLENBOROUGH, C. J. It is quite plain from the whole scope of the navigation laws in the time of Car. 2, that colonial produce could not legally be shipped from the plantations in the *West Indies* to any part of *Europe* except *England, Wales, and Berwick-upon-Tweed*; though since the Unions the privilege has been extended by particular acts. (a) A strong legislative declaration of this is to be found in the stat. 25 Car. 2. c. 7. s. 2, which recites the

(a) *Vid.* Act of Union with *Scotland* 5 Ann. c. 8, article 4, and 12 G. 2. c. 30, and 15 G. 2. c. 33, and the Act of Union with *Ireland*, 39 & 40 G. 3. c. 67, article 6.

prior permission to carry produce, the growth of the plantations in *America, Asia, or Africa*, from the places of their growth to any other of his Majesty's plantations in those parts (*Tangier* excepted), without paying duties; and that the inhabitants of divers of those colonies, *contrary to the express letter of those laws, have brought into divers parts of Europe* great quantities thereof, which they vend to foreign shipping, &c. to the hurt and diminution of the customs and trade and navigation of the kingdom: and for remedy imposes certain duties on all such commodities, unless bond be given to bring the same to *England, or Wales, or Berwick-upon-Tweed*, and to no other place, and there to land and put the same on shore. (a) The term *plantation* in its common known signification is applicable only to colonies abroad where things are grown, or which were settled for the purpose principally of raising produce: and have never in fact been applied to a place like *Gibraltar*, which is a mere fortress and garrison, incapable of raising produce, but supplied with it from other places. In truth, the term *plantation*, in the sense used by the navigation laws, has never been applied either in common understanding, or in any acts of parliament, (at least none such could be pointed out when demanded in the course of the argument) to any of the *British* dominions in *Europe*; not to *Dunkirk* while that was in our possession, nor at the present day to *Jersey, Guernsey*, or any of the islands in the channel. And the continued exclusion of all these from the direct import trade of the colonies affords a strong practical exposition of the law. And as to the illegality of the transaction attaching only upon the landing of the goods; he said, that though the forfeiture might only attach upon the landing of the goods, yet that the shipping them for that purpose was illegal, and avoided the insurance on such a voyage. The other Judges concurred in the same opinion.

It was then suggested by the plaintiff's counsel, that as the whole voyage was illegal, (which did not appear to have been known to the assured at the time, nor the insurance entered into with intent to contravene the law,) the risk had never attached, and therefore the premium ought to be returned. And in answer to an objection started, that as some part of the cargo was shipped at *Trinidad*, and a liberty was given to exchange, load, and unload at *Martinique*, the voyage would be legal between the two islands, and therefore the risk had commenced; they observed, that there was no evidence of any exchange of cargo at *Martinique*: and that if the shipping the goods at *Trinidad* for *Gibraltar* were illegal, it would not make it less so that liberty of exchange at *Martinique* was given, which liberty was not exercised.

Park, contra, referred to *Andree v. Fletcher*, 3 Term Rep. 266; *Vandyck v. Hewitt*, 1 East, 96, and *Morck v. Abell*, 3 Bos. & Pull. 36, to shew that the assured cannot recover back the premium paid upon an illegal insurance, though unknown to him in fact to be such at the time.

Lord ELLENBOROUGH, G. J. said, that to be sure every person must be taken to be cognizant of the law. And the Court agreed that the plaintiff was not entitled to a return of premium in this case. (1)

Rule absolute. (b)

(a) Vide st. 7 & 8 W. 3. c. 22. s. 8. Vide also the stat. 22 & 23 Car. 2, which recites the same mischief, and enacts "that if any ship belonging to any of his Majesty's plantations, which shall have on board any sugars, &c. shall be found to have unladen in any port or place of Europe, other than England, Wales, or Berwick-upon-Tweed, such ship shall be forfeited," &c.

(1) Vide *Oom & al. v. Bruce*, 12 East, 225, and the authorities cited in the editor's notes to that case. *Shifner v. Gordon & al.* 12 East, 296, 304.

(b) *Quære*, Whether the premium had not been paid into court in this case; but this was not stated in Court.

Freeland and Another, Assignees of Tipping, a Bankrupt, v. Glover.

7 East, 457. June 9, 1806.

A ship on an *African* voyage, the common duration of which is several months, and sometimes extends to a twelve-month or more, arrived on the coast in *August* 1799, and in *February* 1800 her then commander wrote a letter to his owners, mentioning an attack on her at an other place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and a fever the crew were reduced to five, and all those sickly, and not a man to be procured at hand; that they had been plundered of their cloaths, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st *April*, 1800, from *Gaboon River*, mentioned their arrival there on the 24th *March*; that the natives finding them weakly handed, and their goods taken from them, did as they pleased; that they had then 9 men on board, but their provisions run very low; that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest and to sail at the end of the next month. An insurance was effected in *September* 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of *Africa*, &c." Held sufficient that the last letter truly stated the then condition and circumstances of the ship; which, though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances; the second letter, both in its terms and contents, referring to a former letter, which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties in part subdued, and to the extent truly stated in the second letter, would have varied the risk; and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship on the coast was only on the 24th of *March*, when she was stated to have arrived in *Gaboon River*, and to have had much of her homeward-bound cargo on board on the 21st of *April*, and was expected to sail with the remainder by the end of *May*.

THIS was an action on a policy of insurance on goods on board the ship *Neptune*, "lost or not lost, at and from 24 hours after her arrival at her first place of trade on the coast of *Africa*, during her stay and trade on the coast of *Africa* and *African* islands, and at and from thence to *Liverpool*:" at a premium of 25 guineas per cent. The declaration contained the usual averment that the ship, with the cargo, was, after 24 hours from her arrival at her first place of trade on the coast of *Africa*, to wit, on the 16th of *June* 1800, in good safety at a place authorised for the said ship to be at within the risk and meaning of the policy. It then stated a loss by the perils of the sea in the course of the voyage insured homewards. The cause was tried at the sittings after *Hilary* term last at *Guildhall* before Lord *Ellenborough*, C. J., when a verdict was found for the plaintiffs: and a rule nisi having been obtained for setting aside the verdict and having a new trial, the only question was, whether at the time of the insurance effected material information had been concealed from the underwriters? As to which it appeared, that the *Neptune* sailed from *Liverpool* on a general trading voyage to the coast of *Africa* in *June* 1799, and arrived at *Gaboon* on that coast on the 7th of *August* following. And on the 15th of *February* 1800, *Skelton*, the then master, wrote the following letter, dated *Bimbia*, to *Tipping* one of his owners; the suppression of which, as well as of information of the time when the ship first arrived on the coast, from the knowledge of the underwriters, was the subject of complaint. "Sir, I am sorry to inform you of the melancholy circumstance that happened on board the snow *Neptune* off *Cape St. John's* close to the river *Danger*. Capt. *Fisher*, finding all the ship's crew in a very bad fever, thought it proper to stand in shore and get some stock for the sick. Three canoes came off, and we bought fowls, &c.; but the blacks began to be very impudent. The blacks took a cutlass from the captain, and killed him on the spot, and stabbed him in twenty places. They killed the steward and one of the landsmen: the rest of the people all very much wounded. There were a good many of

the blacks killed on the deck by the boatswain and two of our men; all the rest of our men were in a very dangerous fever. The second mate died four days after of a fever and his wound together. At this time only six hands are left alive. Our condition is to be pitted. We were 14 days at sea before we reached *Bimbia* where the *Neptune* is lying. I have buried the boatswain since my arrival here. I am sorry to inform you, that there are only five left alive in the ship, and I cannot get one man here, nor in *Calabar*, nor at *Camaroons*; and what to do I do not know. We are all very sickly. We have on board at present about 6 tons of ivory, 6 puncheons of palm oil, 2 puncheons of pepper, 2 casks of bees-wax, till I get to *Gaboon* where our wood is. The blacks plundered the ship of all our clothes and several other things which I cannot mention: and our cabin stores are all done; but that I do not mind, if I only had men to get the ship to *Gaboon*, to get our wood. (Signed) "*G. Skelton*." The following letter was the only intelligence communicated to the underwriters at the time of effecting the insurance in *September* 1800. It was from *Skelton* to Mr. *Tipping*, dated *Gaboon River, April* 21st, 1800. "Sir, This comes to inform you that we arrived in *Gaboon River* on the 24th of *March*, and have only got on board one-third of our red-wood, and the most part by our long boat. The natives on shore finding us weakly handed, and our goods taken from us, do as they please. I have nine men on board now; but our provisions run very low. You may think the trouble and fatigue I have with the natives on shore; and I do not expect to get all my wood till the latter part of next month: then you may expect my sailing. The wood in general is in very small billets. The ivory, palm oil, bees-wax, and pepper, I made mention of in my last letter. I got 5000 billets of choice wood from *Prince William* side, every billet as big as four of the billets at *Batavia* side. It is a very hurt to me staying so long here; but I do my endeavour to get the wood off, &c." (Signed *G. Skelton*.)

Sir *V. Gibbs* and *Littledale* shewed cause, and argued that the last letter, containing the latest intelligence, was the most material to be shewn to the underwriters; as the question was, whether a true representation of the state of the property at the time of the insurance effected, as far as it was known to the assured, was made; and not whether information of prior difficulties or dangers, which had been overcome and were passed, had been suppressed. That there was a reference in the last to the former letter, which was sufficient notice to the underwriters to enable them to call for that letter if they wished for further information respecting the ship.

Park and *Morice*, contra, contended that the suppression of the first letter was material, not only because it explained all the causes of the distress represented generally in the second letter; but because it might be inferred from the latter that the ship had first arrived on the coast on the 24th of *March*, instead of having been there many months before. And it was not enough that it referred to a former letter; for that might have been written after the ship's arrival in *Gaboon River* on the 24th of *March*; and it is the first letter only which refers to prior transactions. And of these it was important that the underwriters should be informed, as the policy was to take effect from an antecedent time, and average losses might have been incurred. The second letter does indeed mention the ship being weakly handed, but it says nothing as to the murder of the captain and several of the crew; the sickness of the rest; and the difficulty of getting more hands; all which enhanced the future danger, and would have made the ship almost uninsurable: at least the underwriters ought to have had an opportunity of exercising their judgment upon it. And this, they said, was not like *Haywood v. Rodgers*, 4 East, 590, where it was ruled, that there being an implied warranty by the assured of seaworthiness in every assurance, it was not necessary for him to disclose any facts, unless demanded, which formed an ingredient in sea-worthiness. [*Lawrence*, J. having asked, whether there were not equally an implied warranty

that at the time of the insurance directed there was a sufficient crew, rigging, and provisions to navigate the ship for the purpose of the voyage insured! They answered, That the period of implied warranty was at an end in this case when the first letter was written; for the insurance was *at and from 24 hours* after her arrival at her first place of trade on the coast of *Africa*: the warranty would therefore be complied with by the ship being properly equipped and manned for the occasion at that period: and therefore any subsequent defects or misfortunes which enhanced the risk after that time, and which were known to the assured at the time of effecting the insurance, were the proper subjects of representation, and ought to have been disclosed.

Lord ELLENBOROUGH, C. J. In every case of this sort it is necessary that there should be a full and fair disclosure of all the material circumstances affecting the actual state and condition of the ship at the time of the insurance effected. And the question is, whether that has not been made in this case; taking it for granted, as we must, that the underwriter was before cognizant of the course of the trade which was the subject of insurance. Now no underwriter is so little conversant with the *African* trade as not to know that it consists in truck, and that the ships engaged in it always continue for some time upon the coast; in some instances, as we learn from cases which have come before the courts, for above a year. Here the assured laid before the underwriters the latest account of the ship, in a letter dated from *Gaboon River* on the 21st of *April* 1800, by which it appeared that the ship arrived in *Gaboon River* on the 24th of *March* preceding, and had then on board part of her homeward cargo. It was open to them to inquire, if they thought it material, whether that were her first arrival, or how long before she had arrived on the coast; for the insurance was during her stay and trade there: but the fair inference from the letter is, that she had been upon the coast for some time before; for the writer refers to different articles of the cargo of which he had made mention in his *last letter*; it is not even said *his first* letter, so that there might have been several written before: but at least it referred to the other letter, the letter in question. Then the writer states, that the natives on shore, finding them weakly handed, did with them as they pleased. It must be collected from this, that they were at the mercy of the natives, and consequently that the risk was hazardous: and this indeed is evinced to have been the feeling of the underwriters by the largeness of the premium. Then the writer says, that he has *nine* men on board *now*, but that their provisions run very low. What is that but contrasting the then number of his crew, as if greater than it had been before, with the present low state of his provisions. He then discloses the continuing differences with the natives; and afterwards refers to the mention he had made in his last letter of different articles of his homeward cargo; importing that he had in that letter made a full disclosure of all that related to it. If then the underwriters wished for further information as to prior circumstances, they should have asked for that letter, of the existence of which they thus had notice: and if, when demanded, it had been withholden from them, the observation made in *Haywood v. Rodgers* might have applied. Here however the assured disclosed every thing which he knew as to the existing state of the ship at the time: it was a true statement of its then actual situation; and it suggests a former communication, so as to put the underwriters upon further inquiry if they thought it material. The ship was stated to be weakly handed, which was the material fact: and whether that had been before occasioned by the sabre or by sickness could not then signify. The former letter would not have communicated in substance more than the underwriters had information of. There was therefore no concealment of any thing material.

GROSE, J. The policy is impeached upon the ground of concealment of material information from the underwriters: but it is admitted that the letter which was shewn to them disclosed the actual state of the ship at the time it

was written; and refers to a former letter, as shewing its former different condition. The writer mentions that the natives *finding them weakly handed and their goods taken from them*, (which evidently alludes to some former communication) did as they pleased with them: and he says, that he has nine men *now*, which, contrasted as it is with the then low state of their provisions, shews that their condition in respect of the number of the crew was better than it had been. The underwriters might have seen the former letter referred to, if they had thought proper to call for it. I cannot say, therefore, that there has been any unfair concealment, when the letter which was communicated to them contained a fair account of the then state of things, and they had, or might have had, if they had thought it material, the account of the prior condition of the ship.

LAWRENCE, J. On the first reading of the letter shewn to the underwriters I thought it implied that the ship had only arrived on the coast on the 24th of *March*; but on looking again at it no such inference can be drawn from it. It certainly cannot be necessary in order to effect an insurance to detail to the underwriters all the previous proceedings of the ship: but it is sufficient that the letter shewn to them represented truly the then state of the ship, and referred to the former letter. He here commented upon the terms of the second letter, as shewing its reference in different parts to a former account: and particularly from its stating the arrival of the ship at *Gaboon River* (not saying *on the coast*) on the 24th of *March*; that their provisions were so much reduced; that the several articles of lading enumerated had been taken in; and that they expected to sail homewards at the end of the next month, which was supposing that their stay and trade on the coast would not be above two months; that the underwriters must have collected that the letter was written towards the latter end of such a voyage, which is known to be of several months duration; and that they could not have understood that the first arrival of the ship on the coast of *Africa* was on the 24th of *March*. If then they wished for further information as to the time when she first arrived, or of the circumstances which had occurred to place her in the condition described in the second letter, it was their own fault that they did not call for it, when the letter they saw referred to a former letter.

LE BLANC, J. The ground of the motion for a new trial was, that as the underwriters were to be upon the policy 24 hours after the ship's arrival on the coast of *Africa*, it became material to them to know whether they had been a twelvemonth upon the policy, or only from the 24th of *March* preceding the insurance in *September*. The policy however was not at and from the river *Gaboon*, but at and from the ship's arrival on the coast of *Africa*, and therefore the mention of the ship's arrival in that river on the 24th of *March* did not imply that it was her first arrival on the coast; and the comments which have been made on the contents of the second letter shew that the underwriters could not have collected that from it. And as that letter referred to the former one, the underwriters, if they wished to know particularly when the ship had arrived on the coast, might have called for the former letter. Though it was fairly to be inferred from the circumstances mentioned in the letter which was shewn to them, that the ship had arrived on the coast before the 24th of *March*.

Rule discharged.

The King v. The Inhabitants of Topsham.

7 East, 466. June 11, 1806.

An order of removal, directed to "*the parish of Poole, or town and county of Poole,*" is sufficient, though the proper name of the parish be *St. James in Poole*; there being no other parish in the town and county of *Poole*. An apprentice to a ship owner living at *A.* gains a settlement by residing on board his master's ship for 40 days in *B.*

while the ship was staying and trading there in the course of his master's trade and employ upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.* where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than 40 days before his apprenticeship expired, will not regain him a settlement in *A.*

TWO justices of the county of *Devon* made an order for the removal of *John Cotter*, mariner, from the parish of *Topsham* in the same county to the parish of *Poole or town and county of Poole*; which order was addressed to the churchwardens and overseers of the poor of the parish of *Topsham* in the county of *Devon*, and to the churchwardens and overseers of the poor of the parish of *Poole or town and county of Poole*; and adjudged the settlement to be in the latter place by the same description. An appeal was lodged against this order by the parish officers acting for the town of *Poole*, to whom the pauper was delivered with the order: and before the merits of the case were gone into on the hearing of the appeal, the appellant's counsel objected to the order for its uncertainty, and in other respects; and it was proved, and was stated in the case afterwards reserved, that there was no such parish as the parish of *Poole*; that the town and county of *Poole* consisted but of one parish, and that the name of that parish was *St. James's in Poole*. The Sessions however overruled the objection, and proceeded upon the merits; and finally quashed the order, subject to the opinion of this Court upon the following case; in which was also included a statement of the facts above mentioned, relating to the objection to the form of the order.

The pauper *John Cotter* at the age of twelve years was bound by indenture apprentice as a mariner to *D. Sweetland* of *Topsham*, ship-owner and coal-merchant. He served his said master for three years, during which he made several voyages, and returned to *Topsham*; residing there in the intervals between the voyages sometimes for two months. His last voyage was on board the *Reward* of *Topsham*, which sailed first to *Shields* and from thence to *Poole* with a cargo of coals. The pauper remained at *Poole* upwards of 40 days, and slept every night during that time on board the said vessel as it lay alongside the quay. He knew whilst he was there that his master was become a bankrupt, and gone from *Topsham*: in consequence of which he applied to *Mr. Penny*, the agent and consignee of the vessel, for money, to enable him to return to *Topsham*, who supplied him with half-a-guinea for that purpose. On his arrival at *Topsham* he resided with his uncle, not being able to find his master, whom he has never seen or served since. The indentures were offered to be given up by one of the assignees of *Sweetland*; but were not in fact given up until after they expired.

Burrough and *Pell*, in support of the order of Sessions, contended, 1st, that the residence of the apprentice at *Poole* was merely casual and accidental, the vessel in which he served being there in transitu, and its proper home being at *Topsham*. That in *Rex v. Burton Bradstock*, Burr. S. C. 531, where an apprentice was holden to gain a settlement by serving his master for above 40 days in *Bridport* harbour, which is within the parish of *Burton Bradstock*, the Judges relied on the circumstance that the home of the ship was there. That it would be very inconvenient in these cases if the settlement of seafaring apprentices were to be shifting backwards and forwards in every port to which they came, though but for a day, if upon the whole they had slept there 40 nights during the subsistence of the indentures. That the doctrine of casual residence in a place for 40 days not giving a settlement there was confirmed in *Rex v. Alton*, (a) where a servant's serving his master for the last 40 days of his year at a watering-place (*Scarborough*) being considered only as a sojourner, and not an inhabitant, did not give him a temporary settlement there: and that the general doctrine of that case, as to casual resi-

(a) Burr. S. C. 418, and vide S. C. Burn's Just. tit. Poor. (Sett. by Service.)

dences, was not denied in *Rex v. Bath Easton*, Burr. S. C. 774. 2dly, They contended, that at any rate the apprentice regained a settlement in *Topsham*, whither he returned after he had left *Poole* by the assistance of his master's agent, and served out the remainder of his time there, *Rex v. Brighthelmstone*, 5 Term Rep. 188, which was the original home of himself and his master: and that actual service to the master was not necessary; but the indentures still subsisted in point of law, notwithstanding the bankruptcy of the master. (a) 3dly, They objected that the order was improperly directed to the parish of *Poole*, or town and county of *Poole*, when the proper name of the parish was *St. James's in Poole*: and that even if the error were amendable at the sessions by the statute, they had not amended it, but overruled the objection.

East and *Lyon*, contra, were stopped by the Court.

The Court were clearly of opinion against the parish of *St. James in Poole* upon all the points. As to the 1st, they all agreed that the residence of the apprentice on board his master's ship in *Poole* was not a casual or accidental residence: but he was then in the actual employ and service of his master in his trade and business, which in its nature required a shifting residence. That the principal doubt made in the case of *The King v. Burton Bradstock*, was, whether the residence of an apprentice on board a ship were equivalent to a residence on shore in the same parish; and what was thrown out by the Court there, in respect of *Bridport* harbour being the home of the ship, was principally in answer to that objection. And that the doctrine of casual residence, as applied to places of public resort, which had been thrown out in the *Scarborough* case, was pretty much shaken in the subsequent case of *Bath Easton*. That at any rate, however, the doctrine did not apply to a case like the present, where the apprentice was in the actual service of his master at the time. And as it was clear that an apprentice might gain a settlement by serving another master in a different parish, by the consent of his original master, *a fortiori* he gained a settlement by serving the original master himself in another parish, where his master's business called him. (b) Upon the second point, it appeared by the case, that the apprentice never returned to his master's service in the parish of *Topsham*, for his master had absconded before his return; but he went to live with his uncle: and it is expressly found, that he never saw or served his master afterwards. (c) In the *King v. Brighthelmstone*, the apprentice returned to his master again in the original parish. As to the third point, they said there was no objection to the description of the *Parish of Poole*, omitting the mention of its tutelary Saint; there being but one parish in the town and county of *Poole*, and *Poole* being the common name of the place. And that the parish officers of *Poole* had themselves considered this description sufficient to call upon them to appeal to the sessions against the order, by whom the objection to the misnomer had been overruled. (d)

Order of sessions quashed, and original order confirmed.

(a) Vide *Buckington v. Skepton Bechamp*, 1 Stra. 582, and 2 Ld. Ray. 1352, and S. P. as to Servants. *Rex v. St. Andrew*, Holburn, 2 Term Rep. 627.

(b) See the Huntsman's case, *Bishop's Hatfield v. St. Peter's* in *St. Alban's*, Fol. 197, referred to and commented upon by Lord Mansfield, in *Alton v. Elvetham*, Burr. S. C. 423, 4. Also the case of the servant of the Oxford stage-coachman, *St. Peter in Oxford* and *Chipping Wicomb*. 1 Stra. 525. Also the groom's case, *East Hsley v. Weybridge*, Burr. S. C. 722.

(c) Vide ante, 381. *Rex v. Barmby-in-the-Marsh*. [*The King v. Smerdon*, 13 East, 452.]

(d) Vide *Rex v. Madley*, Burr. S. C. 202. *Rex v. Andover*, Cald. 373. *Rex v. Ulverstone*, 7 Term Rep. 564, and *Rex v. Harrow on the Hill*, 2 Const's Bott. 828, 3d edit. Tit. *Appeal to the Sessions*.

The King v. The Inhabitants of Rushall.

7 East, 471. June 11, 1806.

The pauper desired her mother to look out for a place for her, and the mistress on the application of the mother sometime before *Old Michaelmas*, said that she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter, though she informed her that she had got a place for her if she liked it. About a week after *Old Michaelmas*, the mistress applied to the pauper to know if she liked to come into her service, and they then agreed for the first time for certain yearly wages (the same as the other servants) *with liberty of parting at a month's wages or warning*: held that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas* or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit at *Old Michaelmas-day*, which the mistress accepted, and procured another servant to come on that day, when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week: to which the mistress said that it did not signify, as she had got another servant in her place: held that this was a dissolution of the contract before the end of the year, by the notice to quit given and accepted, and not a mere dispensation of the service; and consequently no settlement was gained by such hiring and service.

TWO justices, by an order, removed *Susannah White*, singlewoman, from the parish of *Wiston* in the county of *Sussex*, to the parish of *Rushall*, in the county of *Wilts*. The sessions on appeal confirmed the order, subject to the opinion of this Court upon the following case.

The pauper being 30 years of age, and a native of *Wiltshire*, and her mother and other relations living near *Rushall*, some time before *Old Michaelmas-day* 1802, the time at which the service in which she was then living at *Wiston* in *Sussex*, was to end, wrote to her mother, desiring her to look out for a place for her; which she did, and in consequence treated with the wife of the Rev. *K. Peck* of *Rushall, Wiltshire*; upon which Mrs. *Peck* informed the mother that she would give her daughter the same wages as she did to her other servants, (being 10 guineas a year and a guinea for tea,) and wait till she came down, and desired that she would come as quickly as she could; but the mother made no absolute agreement for her daughter, but afterwards informed her that she had got a place for her if she liked it. The pauper left her service in *Wiston* immediately on its expiration, and went into *Wiltshire* without delay, and arrived on *Saturday* the 16th of *October* at her mother's near *Rushall*; and on *Monday* the 18th Mr. *Peck* applied to her to know if she liked to come into his service, saying that he wanted her to come immediately, as he had company to dinner. She went to Mr. *Peck's* house, and then it was for the first time agreed between Mrs. *Peck* and her, that the wages should be 10 guineas for the year and a guinea for tea, (which was the same as she had given to her other servants) with liberty of parting at a month's wages or a month's warning. She then went to work, and continued in Mrs. *Peck's* service until *Old Michaelmas-day* following. About five weeks before that time she gave her mistress notice that she should quit her service at the next *Old Michaelmas-day*. On the said *Old Michaelmas-day* 1803 the pauper came to her mistress to receive her wages, who paid her whole year's wages, and the guinea for tea; but told her she wanted a week of serving out her year. The pauper said she was willing to stay another week; but the mistress replied that it did not signify, as she had got another servant in her place, who was then in the house, (which she in fact was.) She then left the house, and never returned into the service afterwards. Upon which facts the court of quarter sessions were of opinion, that the pauper was settled at *Rushall*.

Topping and *D'Oyley*, in support of the order of sessions, contended, 1st, that the mother was to be considered as the agent of her daughter, and that she had made an agreement for her with Mrs. *Peck* before *Old Michaelmas-*

day, though reserving to her daughter the option of dissent if she did not like the service, (which was the meaning of the finding that the mother made *no absolute agreement*, &c.) but as the daughter ultimately approved of her place, that which was at first a conditional became an absolute hiring before *Old Michaelmas*, though her approbation were not signified till afterwards. And this was not varied by the subsequent stipulation for liberty to either party to part at a month's wages or a month's warning, such liberty not having been acted upon till the end of the year from the original hiring. And they said there was nothing unreasonable in the reservation by the mother of an option for her daughter to dissent from the contract, while the mistress was at all events bound if the daughter approved of the place; because the daughter was to come from a great distance at her own expence. But 2dly, supposing the contract of hiring not to have commenced till the 18th of *October*; still a settlement would be gained; for when the mistress observed that the pauper had not served out her year by a week, she offered to stay another week in the service; and her mistress telling her it did not signify was a dispensation of the service for the remainder of the year: which distinguishes this from the cases of *Rez v. King's Pyon*, 4 East, 351, and *Rez v. Sudbrooke*, 4 East, 356: and that is confirmed by the mistress having paid the whole year's wages, though that alone would not be decisive. Then the month's notice to quit given by the pauper previous to *Old Michaelmas-day* is no evidence of her intention to quit the service before the end of the year, as it was given under a mistake that the year ended at that time; and as soon as it was objected to by the mistress, it was abandoned by the pauper. And they said, that this was a stronger case of dispensation of service than *Rez v. Richmond*, Burr. S. C. 740. 2 Const's Bott. 514. 3d edit., where a footman left his service 13 days before the end of his year, because another servant, whom he had lately married, was then going away; his master having no objection, as he had another footman coming. Or than *Rez v. St. Bartholomew, Cornhill*, Cald. 48, where on the master's intended change of residence he told the servant to look out for another place: and she went into a new service before the end of the year. And they compared it to *Rez v. St. Philip in Birmingham*, 2 Term Rep. 634, where the servant having given warning eight days before to quit at the end of his year, the master discharged him the same day, paying him his full year's wages; though the servant was willing to stay to the end of his year; which was holden to be a dispensation only of the service, not a dissolution of the contract.

Sir V. Gibbs and *Courthope*, contra, were stopped by the Court.

Lord ELLENBOROUGH, C. J. Upon the first point, if the justices had found as a fact from what time the hiring commenced, the case would have been clear; but as they have not done so, we must draw the inference from the facts stated. The mother, being desired to look out for a place for her daughter, applied to Mrs. Peck of *Rushall*, who informed her that she would give her daughter the same wages as her other servants, and would wait till she came; but the case expressly states that the mother made *no absolute agreement* for her daughter. And indeed there was nothing at that time said about the quantum of the wages, or the time of service, or about the warning, afterwards introduced into the contract, on which either might relinquish the contract. The daughter arrived at *Rushall* about a week after *Old Michaelmas-day*, when upon Mr. Peck's application to her to know if she liked to come into his service, she went there; and then it was, as the case states, for the first time agreed between Mrs. Peck and her, that the wages should be 10 guineas for the year and a guinea for tea, with liberty, which was not before mentioned, of parting at a month's wages, or a month's warning. This was on the 18th of *October*. Then about five weeks before *Old Michaelmas-day*, the pauper gave her mistress notice to quit at *Old Michaelmas-day*. The mistress could not object to receive the notice, and therefore looked out for

another servant : but when the pauper went to receive her wages, the mistress paid her the whole year's wages, but told her that she wanted a week of serving out the year. The pauper then said, indeed, that she was willing to stay another week ; but as the mistress, in consequence of the warning which the pauper had given her, and which she had accepted, had provided herself with another servant, and did not want two of them, she told the pauper that it did not signify, as she had got another servant in her place : on which the pauper left the house. There can be no doubt upon this statement that both parties agreed to put an end to the contract before the end of the year. The servant gave above a month's warning to quit at *Old Michaelmas*, which she had a right to do, and the mistress accepted the warning, and both parties acted upon it. And this it appears was in fact before the end of the year, whatever the servant might have supposed when she gave the warning. Now the rule which the Court has laid down as the test whether the circumstances attending the departure of a servant before the end of the year amount to a dissolution of the contract, or only to a dispensation of the service, is, whether the master has the power afterwards of compelling the continuance of the service : if he have not, there is an end of the contract : if he have, but choose to dispense with it, it is a dispensation. If, after this, any person had harboured the servant when the mistress desired her services, could she have maintained an action for it ? Certainly not : and that is a fair test that the relation of master and servant had ceased to exist.

GROSE, J. The hiring in this case did not commence till the 18th of *October*, and consequently the year would not expire till the 18th of *October* following. But there was a liberty of parting at a month's wages or a month's warning ; of which the servant availed herself, and gave due notice to quit at *Old Michaelmas-day*. The reason of that is obvious ; for that is the usual time for hiring of servants in that part of the country, and she meant to look out for another place. The mistress considered it as good notice, and procured another servant to come to her on that day. Here then was a notice by the servant to quit a week before the end of the year, which was accepted by the mistress, and the servant quitted accordingly. It is clear, then, that there was not a year's service, and consequently no settlement gained by the pauper in *Rushall*.

LAWRENCE, J. On the first ground, there is no pretence for saying that this was a hiring from *Old Michaelmas-day*. The daughter desired her mother to look out for a place for her, and she, before *Old Michaelmas*, treated with Mrs. Peck of *Rushall* on behalf of her daughter ; but no absolute agreement was made at that time ; nor was there any till the 18th of *October*, when, for the first time, it was agreed between Mrs. Peck and the pauper, that the latter should have 10 guineas a-year wages, and a guinea, for tea, with a liberty of parting at a month's wages, or a month's warning. That must be taken to be a contract to commence from that time, there being no reference to any antecedent time. And in truth, both parties so considered it at the time of parting ; for when the mistress, on paying her whole year's wages, told the pauper that she wanted a week of serving out her year, the latter did not dispute that, but in effect admitted it, and said that she was willing to stay a week longer. The mistress however stood, as she had a right to do, upon the warning which had been given, and said that it did not signify, as she had provided herself with another servant in her place, who was then in the house : on which the pauper accepted her wages, and went away before the end of the year. There is clearly therefore no settlement.

LE BLANC, J. If the Sessions upon this statement of facts had found this to be a hiring from *Old Michaelmas-day*, it would have been bad. But it is now contended that the hiring commenced, not from *Old Michaelmas-day*, but from the day that the mother spoke to Mrs. Peck : but no agreement was then made ; the mistress only told the mother what wages she gave, and that she

would not fill the place which was vacant in her family till her daughter came, only desiring that she would come quickly. Then when the daughter did come the terms were settled, which had not been mentioned before. In the absence then of any reference for the commencement of the hiring to the prior time when the mother spoke to Mrs. Peck, we can only say that it was a hiring from the time when the agreement was actually made, and the terms settled between the mistress and servant. Then on the second point; there was a liberty to part on a month's wages, or a month's warning; which distinguishes this from all the other cases of dispensation of service, where the only duration mentioned was for the year. But here the servant had an option of determining the authority of the mistress upon a month's notice; which she availed herself of; and gave a month's notice to quit at *Old Michaelmas-day*: the mistress accepted the notice, not as being to quit at the end of the year, but as a month's warning. And though she gave the pauper the whole year's wages, yet she pointed out to her that she was not entitled to so much, because she wanted a week of serving out her year. The pauper did not deny that, but offered to stay out the week. However the mistress did not consent to that, as she had got another servant, in consequence of the other's notice to quit. The pauper therefore took her wages, and departed before the end of the year.(1)

Both Orders quashed.

Basten v. Butter.

7 East, 479. June 13, 1806.

Where the plaintiff declares upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff has been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, quære, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice.

ASSUMPSIT for work and labour done, and materials found, with the common counts. Plea, *non assumpsit*. At the trial before Thompson, B., at the last *Exeter* assizes, the plaintiff's witnesses proved, that the defendant, who was a farmer, employed the plaintiff, a carpenter, to do some work for him on his farm: and the plaintiff's workmen put on a roof on a linnay, and also roofed a barn; (the defendant finding the timber and nails;) and also made gates on the farm, and rails near the house: and the plaintiff demanded 3*l.* 14*s.* 7*d.* as now due, but his witnesses did not make out above 3*l.* On the part of the defendant it was stated, that it would be proved that the work had been done by the plaintiff in a very improper and insufficient manner: that the linnay was too weak in the roof; which, after being covered with thatch, sunk in the middle so as to let the water through; and that neither the rafters or roof of the linnay or the barn were sufficiently supported. And therefore it was contended, that the plaintiff was not entitled to recover what he now claimed, as remaining due to him. *E contra* it was insisted, that this was no answer to the action; but that if the work had not been properly done, it was the subject of a cross action by the defendant against the plaintiff. The learned Judge was inclined to have admitted the defendant into evidence of

(1) Vide *The King v. Hardhorn with Newton*, 12 East, 51 upon a similar point, but distinguished from this case.

this defence; but upon the authority of a case of *Broom v. Davis*,^(a) which was cited, he rejected the evidence proposed; and the plaintiff recovered a verdict for 3*l.* with liberty to the defendant to move this court for a new trial; which was moved accordingly in *Easter* term last by -

Jekyll, who said, that there were contradictory decisions upon the point. *Buller*, J. in the case alluded to, having rejected the evidence of inadequate execution of the work contracted for at a certain price. But in *Duffit v. James*, at the sittings at *Westminster*, in *June* 1788, which was an action to recover the amount of a surgeon's bill, Lord *Kenyon* permitted the defendant to give evidence of unskilful treatment of him by the plaintiff; taking the distinction where the demand was for skill, where the question might be, whether the plaintiff were entitled to any thing or nothing; and where the action was for goods sold and delivered, or other certain thing of value, not depending on skill: and considering the case in judgment before him as a mixed question, where the demand was in part for skill as well as for medicine. There was also another case of *Cormack v. Gillis*, *Middlesex* sittings after *Easter* 1788. In *assumpsit* for goods sold and delivered, the case was, that the plaintiff was a seedsman, and sold to the defendant, who was a gardner, seeds, with a warranty that they were of the sorts and quality for which they were sold. *Buller*, J. held, that the plaintiff was entitled to recover the price agreed on; and that the defendant was not at liberty to shew that the seeds were not of the sort, &c.; but must bring his cross action if the warranty were not complied with. And the plaintiff having recovered, *Gillis* did bring his cross action against *Cormack*, which was tried before Lord *Kenyon*, at the sittings in *Middlesex* after *Hilary* 1789; and in the course of the cause, what had passed on the former trial was mentioned to Lord *Kenyon*, who seemed to be of opinion, that the non-compliance with the warranty might have been given in evidence in the former action in reduction of the damages, or to shew that the seeds delivered were of no value.^(b) A rule *nisi* having been granted,

Lens, Serjt. now shewed cause. The action was brought for a common carpenter's bill by the plaintiff, who had employed workmen under him, whom he had paid for doing the work which was finished. If the work stipulated for were improperly done, the damage is recoverable in a cross action; but that is no objection to the plaintiff's recovering in this action the full value of the materials found, and labour employed and paid for by him. [*Grose*, J. asked if there had been any particular sum agreed for; to which he was answered that there was not; that the plaintiff had only been employed gene-

(a) *Broom v. Davis*, Taunton Lent assizes 1794, cor. *Buller*, J.—*Assumpsit* for the price of erecting a booth on *Bath* race ground. The plaintiff proved that the measure of the booth was settled between him and the defendant; that he was to have 20 guineas for building it, five of which were paid before hand, and to take back the materials after the races; and that he did build it according to the stipulated dimensions. The defendant proved that the booth fell down in the middle of the races, owing to bad materials and bad workmanship, and that the plaintiff was fully apprised of both: and contended, that as the Plaintiff had not built a booth to answer the purpose, he ought not to be paid the remainder of the 20 guineas. But *Buller*, J. ruled that this was no defence to the present action, especially as a particular sum was specified and part of it paid; though a cross action might be brought against the present plaintiff for building the booth improperly.

(b) In addition to the above cases I have been favoured with another, which, together with those already mentioned, were taken by a gentleman at the bar. *King v. Boston*, *Middlesex* sittings after *Easter* 1789. The plaintiff had sold to the defendant a horse, warranted sound, for 12 guineas, of which the defendant had paid three. In fact, the horse was not sound; and the defendant refusing to pay any more, this action was brought for the value of the horse sold, to recover the difference. It was proved that the horse, at the time of the sale to the defendant, was not worth more than 1*l.* 11*s.* 6*d.* and the defendant afterwards sold it for 1*l.* 10*s.* Lord *Kenyon* held, that the plaintiff could only recover the value: and more having been paid to him by the defendant, he nonsuited the plaintiff.

rally as a carpenter to do the work.] The objection is not that the work directed to be done was not done; but that it was not properly executed. [*Lawrence, J.* The plaintiff claims as upon a *quantum meruit*. Then if it can be shewn that the work was done ill, and was of no use to the defendant, will not that shew that the plaintiff does not deserve what he claims?] The cases before *Buller, J.* establish a contrary doctrine. And he also mentioned a case of *Morgan v. Richardson*, as to the like effect, ruled by Lord *Ellenborough* at *Guildhall*.^(a) Though no money had been paid into Court, yet the plaintiff's bill was originally 16*l.*; and all the rest of it, except what is sought to be recovered in this action, has been paid on account; which is equally an admission of the contract. [*Lawrence, J.* The defendant has probably paid as much as he thinks the work done is worth; and if he be right, this is an attempt to recover more than it is worth. *Grose, J.* There being no precise agreement for any certain sum, the plaintiff was obliged to prove the value of the work done. Then why should not the defendant be permitted to meet that with contrary proof? And here the evidence offered was to shew that the plaintiff had been already paid as much as his work was worth.] He then observed, that this sort of defence was a surprise upon the plaintiff.

LORD ELLENBOROUGH, C. J. In some cases the plaintiff may not be prepared to meet an objection of this sort at the trial; but it does not appear here what had previously passed upon the subject between the parties. Where a specific sum has been agreed to be paid by the defendant, the plaintiff may have some ground to complain of surprise, if evidence be admitted to shew that the work done and materials provided were not worth so much as was contracted to be paid; because he may only come prepared to prove the agreement for the specific sum and the work done, unless notice be given to him that the payment is disputed on the ground of the inadequacy of the work done. But where a plaintiff comes into court upon a *quantum meruit*, he must come prepared to shew that the work done was worth so much, and therefore there can be no injustice to him in suffering this defence to be entered into, even without notice. And that used to be the practice before Mr. Justice *Buller*.

GROSE, J. The plaintiff in this action must at all events have been prepared to shew what he was entitled to receive for the work done; and therefore the defendant ought to have been let into his defence.

LAWRENCE, J. In the case of *Brown v. Davis*, where there had been a specific sum agreed to be paid, their might be more reason for saying that such a defence would be a surprise upon the plaintiff: and there the rule laid down by Mr. Justice *Buller* may be a good one, if the plaintiff has had no notice of the kind of defence intended to be set up against his demand. But even there, if the plaintiff have previous notice that the defendant means to dispute the goodness or value of the work done, I think the defendant ought to be let into his defence. For, after all, considering the matter fairly, if the work stipulated for at a certain price were not properly executed, the plaintiff would not have done that which he engaged to do; the doing which would be the consideration of the defendant's promise to pay, and the foundation on which his claim to the price stipulated for would rest: and therefore, especially if he should have notice that the defendant resists payment on that ground, he ought to come prepared with proof that the work was executed properly. But where the plaintiff comes upon a *quantum meruit*, this defence can be no

(a) This latter case was, however, explained, by gentlemen at the bar, to be an action upon a bill of exchange given for the price of some hams sold by the plaintiff to the defendant, which were sent to the *East Indies*, and turned out to be very bad. And the defendant attempted to set up this defence in this action upon the bill, which the Lord Chief Justice thought could not be done, and the plaintiff recovered. But it was observed, that that case turned upon the giving of the security: in addition to which it was said by another gentleman at the bar, that in that case also money had been paid into court, which admitted the bill of exchange declared upon.

surprise upon him; because it is part of his case, and he must necessarily come prepared to shew what the work was worth.

LE BLANC, J. I think that in either case the plaintiff must be prepared to shew that his work was properly done, if that be disputed, in order to prove that he is entitled to his reward; otherwise he has not performed that which he undertook to do, and the consideration fails. And I think it is competent to the defendant to enter into such a defence, as well where the agreement is to do the work for such a man, as where it is general to do such a work. If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to shew that he had put together such a quantity of brick and timber in the shape of a house, if it could be shewn that it fell down the next day: but he ought to be prepared to shew that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed.(1)(2)

Rule absolute.

Hollinshead v. Walton.

7 East, 485. June 17, 1806.

The owner of a tenement may have two distinct rights of common for his cattle, levant, and couchant, upon such tenement, upon different wastes in different manors under several lords; and therefore an allotment under one inclosure act, in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for enclosing the other waste: *semble aliter*, if the different wastes had appeared to have been originally holden under the same lord.

THIS action was tried on feigned issues under a private act of the 42 Geo. 3, for inclosing and allotting the commons and waste ground and mooses within the manor or township of *Egton-with-Newland*, in the parish of *Ulverstone*, in the county of *Lancaster*; and was brought in order to try the propriety of a determination of the commissioners under that act touching the plaintiff's claim to right of common of pasture, and of cutting and taking brackens upon the commons and waste grounds within the manor, in respect of his ownership of certain freehold lands and tenements, about 177 acres in extent, situate within the township or division of *Mansriggs*, in the parish of *Ulverstone*, and contiguous or near to the manor or township of *Egton-with-Newland*.

The declaration consisted of two counts, the first reciting the plaintiff's claim, and the objection made thereto by the defendant and others interested in the said division, and in the determination of the commissioners thereupon; whereby the commissioners having taken into consideration that the said plaintiff had then lately gotten an allotment of common for and in respect of his said freehold lands and tenements situate within the township or division of *Mansriggs*, by virtue of an act of the 39 Geo. 3, intitled "An act for dividing" and inclosing the commons, waste ground, and mooses within the town and "hamlet of *Ulverstone*," did adjudge that the plaintiff had established his claim only to such an allotment of the said commons and waste grounds within

(1) The rule as now settled, is, That if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. Per Lord *Ellenborough*, after a conference with the Judges on the subject. *Farnsworth v. Garrard*, 1 Campb. 38. See also *Kannen v. Mc'Mullen*, Peake's Ca. 59. *Templer v. McLachlan*, 2 New Rep. 136. *Fisher v. Samuda & al.* 1 Campb. 190.

(2) [See *Donew v. Dorell*, 3 Camp. 451. *Money Penny v. Hartland*, 2 C. & P. 378. S. C. 1 do. 352. *Duncan v. Blundell*, 3 Stark. 6.—W.]

the manor or township of *Egton-with-Newland*, as would, together with the value of the allotment which he had then already gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*, make the whole of his allotment for his *Mansriggs* estates equal to an allotment for lands and grounds of the same value situate within the manor or township of *Egton-with-Newland*. And the first issue was, Whether the plaintiff were or were not entitled for and in respect of his said right of common to a larger allotment of the said commons and waste grounds within the manor or township of *Egton-with-Newland*, than would, together with the value of the allotment he had already gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*, make the whole of the allotment for his *Mansriggs* estates equal to an allotment for lands and grounds of the same value, situate within the manor or township of *Egton-with-Newland*. The second issue was, whether the plaintiff were or were not entitled in lieu of his said right of common to an allotment of the said commons, waste grounds, and mooses by the act intended to be divided and inclosed, according and in proportion to his estate and interest therein, without regard to, and without deduction or abatement for or on account of any allotment which he had before the making of his claim gotten upon the commons and waste grounds within the town and hamlet of *Ulverstone*. The plaintiff in his declaration asserted the affirmative of both these issues, which the defendant by his plea denied. The cause was tried at the last assizes at *Lancaster* before *Chambre, J.*, when a verdict was found for the plaintiff with nominal damages, subject to the opinion of the Court on the following case.

The parish of *Ulverstone* comprises divers manors and townships, or divisions, amongst others the town and hamlet of *Ulverstone*, the manor or township of *Egton-with-Newland*, and the township or division of *Mansriggs*; each of which three divisions have separate constables, and separately maintain their own poor and highways. The commons within the town and hamlet of *Ulverstone*, before the inclosure thereof, and those within the manor or township of *Egton-with-Newland*, adjoined upon each other, and the ancient inclosures of *Mansriggs* (which has no common or waste) lie contiguous in different parts thereof both to the commons of *Ulverstone* and of *Egton-with-Newland*. In the year 1736, *John Duke of Montague*, being then lord of the manor of *Egton-with-Newland*, purchased the manor of *Ulverstone*, and continued to be lord of both manors till the year 1749; but ever since that period, and before then, and farther than living memory can trace, those two manors have been holden by and under different lords, and under different and distinct customs and services. The plaintiff, and all former owners of his *Mansriggs* estates, have immemorially, until the allotments hereinaftermentioned, used and enjoyed in right of such estates common of pasture for all commonable cattle levant and couchant thereon, and the liberty of cutting and taking away brackens to be used and consumed on the estate, upon the commons within the town and hamlet of *Ulverstone*, and upon those of *Egton-with-Newland*; and since the said allotment the plaintiff has continued to exercise the same in the said last-mentioned wastes. The plaintiff pays no rates, taxes, rents, or assessments whatsoever unto the manor or township of *Egton-with-Newland*, for or in respect of his said freehold lands and tenements situate at *Mansriggs*. Under the act of the 30 Geo. 3, for the inclosure of the commons and wastes in *Ulverstone*, previous to his making his claims under the *Egton-with-Newland* act, he had claimed and gotten an allotment of common within the town and hamlet of *Ulverstone* of 29 acres or thereabouts, parcel of the common of *Ulverstone*, for and in respect of his said estate at *Mansriggs*, and in satisfaction of his rights thereon: being in proportion to his land-tax payable for the same; that being the rule of division mentioned in that act (pages 13 and 14.); and which said allotment is the allotment referred to in the determination of the commissioners and in the issues. The question for the opinion of

the Court was, Whether the plaintiff were entitled to recover? If he were, the verdict to stand; otherwise the verdict to be entered for the defendant.

Holroyd contended for the plaintiff, that he was not entitled to a less allotment in respect of his rights on the *Egton-with-Newland* commons for his *Mansriggs* estate, under the *Egton* inclosure act, 42 Geo. 3, on account of his having previously obtained an allotment for the same estate on the *Ulverstone* commons under the *Ulverstone* inclosure act of the 39 G. 3; for the rights of common on the several wastes were distinct, and holden under different lords, so that an allotment in respect of the one could be no compensation to the owner for the loss of the other, which he was equally entitled to enjoy, and had in fact continued to enjoy subsequent to the acquiring of the first allotment. And he referred to s. 27, (p. 13 & 14.) of the *Ulverstone* act, 39 Geo. 3. c. which directs the commissioners "to set out certain parts of the commons, waste grounds, and mooses thereby directed to be divided and inclosed, in proportion to the land-tax paid by all the owners of lands and tenements within the township or division of *Mansriggs*, and by such of the owners and proprietors of lands and tenements, within the several townships of *Osmotherly* and *Egton-with-Newland* in the parish of *Ulverstone*, as are entitled to right of common upon the said commons, waste grounds, and mooses for their lands or tenements in respect of which they are entitled to such right of common, &c.; which parts so to be set out shall by the commissioners be allotted amongst the several owners of lands, &c. in *Mansriggs* aforesaid, and such owners of lands, &c. in *O.* and *Egton-with-Newland* who are entitled as aforesaid," &c. And he also referred to s. 29, of the same act, which provides "that nothing in this act contained shall extend to prejudice or affect the rights of the several owners of lands, &c. within the several townships or divisions of *Mansriggs* and *Egton-with-Newland*, or any of them, in and upon the commons, waste grounds, and mooses, within the said township or division of *Egton-with-Newland*, or any part thereof."

LORD ELLENBOROUGH, C. J. called upon the defendant's counsel to shew some objection to the plaintiff's claim, as none occurred to the Court upon the statement of the case, from which it was to be collected that the rights of common claimed under the two inclosure acts for the plaintiff's estate of *Mansriggs*, were in two different manors holden under two different lords. He said, that whatever objection might have arisen if the claim had been for a double compensation for a right of common in respect of the same estate on two several commons appearing to have been originally derived from the same lord; yet what objection, he asked, could there be to two distinct rights of common holden by grants under different lords?

Wood for the defendant said, that it did not appear by the case that the plaintiff claimed under several grants of rights of common by different lords; and that the natural and legal presumption was, that the several manors and wastes were originally in the hands of the same lord, from whom the right of common over all was derived. And it could not be presumed that one lord would have granted a right of common over his own wastes to the tenant of another lord in another manor. And, assuming that the several commons were originally in the hands of the same lord, he argued that inasmuch as a writ of admeasurement of common of pasture would have lain in order to apportion to the tenant so much only of the common as he would have been entitled to for his beasts levant and couchant upon his tenement: therefore, as he had already received compensation for his right out of one of the commons which had been divided and allotted under the *Ulverstone* inclosure act, he was not entitled to any additional allotment in respect of the same tenement under the *Egton* inclosure act. And he referred to Fitzh. Nat. Brev. 125, tit. Writ of Admeasurement of Pasture, in the notes to which it is stated, that "if the defendant has common appendant to his freehold in three villis, it may be admeasured for the lands in one of the villis. Temp. Ed. 1. Ad-

measurement, 14." And also to *Tyringham's* case, 4 Rep. 36. b., the second resolution, 37. b.

LORD ELLENBOROUGH, C. J. The argument proceeds upon assuming a fact which does not appear in the case : and indeed as far as any thing does appear, it must be intended that the several rights of common in the different wastes were holden under different lords ; for it is stated that they came into the hands of the same lord by purchase in 1736, and so continued till the year 1749 : but that both before and since, and beyond living memory, they were holden under different lords. The usage then, from which alone in the absence of any direct evidence of the fact we can make any presumption, shews that these rights were enjoyed under different lords. And if so, there can be no doubt that a man may have two distinct substantial grants of rights of common over different wastes from different lords in respect of the same tenement. It may be advantageous to him to change his pasture from time to time for his cattle levant and couchant upon his tenement ; and immemorial usage is evidence of such distinct grants : for I lay no stress on the short interval of using the *Egton* commons after the *Ulverstone* inclosure act, and before the recent inclosure. If indeed it had been shewn that the right over both commons had been originally granted by the same lord, that might have been a reason for a different construction. In this case, therefore, the allotment which the plaintiff received under the first inclosure act was only a satisfaction for his right of common on the wastes thereby directed to be inclosed ; and he still retained the same right on the *Egton* commons belonging to a different manor which the other commoners there enjoyed, and is therefore entitled to a proportionable compensation with them.

The other Judges concurred : and

LAWRENCE, J. suggested, by way of explanation of the passage cited from the notes in Fitzh. Nat. Brev., that it might be taken that the freeholder claimed common appendant in three villis under the *same* lord : and it might happen that other tenants of the lord had only common in one of the villis ; in which case, if he who had common in all the three turned on all his cattle in one of them, it would prejudice those whose right of common was confined to that one, and they might sue out their writ of admeasurement to apportion the number of his commonable cattle in that one vill.

Postea to the Plaintiff.

Stiles v. Nokes.(a)

7 East, 493. June 13, 1806.

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury : and it is no justification to such insinuation of perjury against the plaintiff (who had sworn to an assault by *A. B.* on him) that it *did* appear (which was the suggestion in the libel) from the testimony of every person in the room, &c. except the plaintiff, that no violence had been used by *A. B.*, &c. ; for non constat, thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial, &c.* and that the *said parts* contain a just and faithful account of the trial, &c.

THE plaintiff, an attorney of this court, brought his action on the case against the defendant for a libel, and declared, that whereas he was always until the publishing of the several false, scandalous, and malicious libels after-mentioned, reputed to be a person of good name, &c. and had never been

(a) This case was discussed in Court under other names.

guilty, nor until, &c. suspected of perjury and other such crime. And whereas the plaintiff before and at the time of the publishing of the said libels, was, and still is, one of the Clerks of a certain Court of Justice, &c. viz. the Court of Requests for the borough of, &c. And hath during that time carried on the office and employment of such clerk with integrity, and hath never been guilty, or until the publishing the said libels ever been suspected to have been guilty, of delinquency in his said office and employment; &c. Yet the defendant, well knowing the premises, but maliciously intending to injure the plaintiff in his good name, &c. and in his said office and employment, &c. and to cause it to be believed that the plaintiff was guilty of perjury, &c. and also of delinquency in his said office and employment, &c. on, &c. at, &c. did falsely, and maliciously compose and publish in a certain newspaper called, &c. a certain false, scandalous, and malicious libel of and concerning the plaintiff in *his aforesaid office and employment of such clerk to the said Court of Requests as aforesaid*: in which are the following false, scandalous, and malicious words: "Judicial delinquency, (meaning the delinquency of the plaintiff in his said office and employment, &c.)—Quarter Sessions. *The King against Stiles*, (meaning the plaintiff.) There are few things for which the present times are more remarkably pregnant, as they undoubtedly are with strange events, than for the number of prosecutions which have recently been instituted against persons sustaining the high and certainly honourable character of Judges. Both the old and the new world have astonished their inhabitants with this phenomenon, &c. Little did we apprehend that the town of ——— would add to the list of judicial delinquents; such however has been the case. At the late sessions for this borough a prosecution was brought forward on *Wednesday* last against Mr. *Stiles* (the plaintiff,) a well-known attorney of this town, and chief justice of the high court of conscience here, (meaning the defendant, clerk as aforesaid to the said court of requests, &c.) for a savage, unprovoked, and brutal attack, as stated by the counsel, on *A. B.*, &c. In the opening of the case it was stated, and afterwards clearly established by evidence, that the said Mr. *Stiles* (the plaintiff) did wantonly and savagely attack *A. B.* at an arbitration, &c. It appeared that though Mr. *Stiles* had on this, as well perhaps as on former occasions, most to say, yet he had not the best of the argument, and fearing that he would be professionally foiled, he had instant and insidious recourse to blows, which were administered with no ordinary violence or treachery. *A. B.* being inferior in corporeal powers urged Mr. *Stiles* to desist; at the same time declaring that upon equal terms he had no personal fear of him, but that he felt the indignity and degradation of opposing himself in such a low and brutal manner, or indeed in any manner to a person whom he would not consider either from his education or habits entitled to his respect, or worthy of his notice." (Here followed a statement in the libel, as if proved by *C. D.* a witness called by the plaintiff, imputing cowardice to the plaintiff, and that he, the witness, had heard *E. F.* make mention of it. On which the plaintiff started from his seat; and then the libel set forth a ludicrous conversation between *E. F.* and the plaintiff, ending with a suggestion from the plaintiff to drop further mention of the matter; on which the libel went on to state;) "This suggestion, extorted from the party mentioned a look of contempt, which we shall leave to the painters to describe, &c. At this moment Mr. *Stiles's* agitation became visible, at least we thought so; and for the first time in our lives we saw or suspected a *suffusion*. Apparently aware of the approaching issue of the trial, and almost on the instant of being pronounced guilty by a jury of his country, he, the plaintiff, hustled out of court, reduced to a condition in which ordinary meanness or brutality might be expected to excite some little compassion. The plaintiff was pursued out of court by the hisses of several of the attending spectators. The feelings of disgust and indignation triumphed over the decorum of the court,

“ and for the moment even ‘order’ was not called. It is painful to record any thing which is so foul and brutal as to defile the character of human nature, but we consider the full blown honours of *our hero* (meaning the plaintiff) ripe for publication, and to withhold such an example would be a sin against society. Though it clearly appeared *from the testimony of every person that was in the room* where the arbitration was held, *except Mr. Stiles*, that no violence was used by *A. B.*, yet reader, hear with horror! a violent assault was sworn against him by *Mr. Stiles*, and a bill of course found by the grand jury; (thereby meaning and insinuating that the plaintiff had been guilty of perjury in swearing before the said grand jury that an assault had been committed upon him, the plaintiff, by *A. B.*, and that a bill of indictment was found by the said grand jury against *A. B.* by means of the perjury of the plaintiff.) When *A. B.’s* trial came on no witness appeared against him; and though *Mr. Stiles* in his exculpatory address to the jury expressly mentioned and urged with marked force the fact of a bill having been found against *A. B.* for a violent assault upon him; yet *Mr. Stiles’s* professional associate said, that it was not his (*Stiles’s*) intention to proceed against *A. B.*” (Here followed irrelevant matter, as if stated by *A. B.’s* counsel, tending to ridicule the plaintiff: concluding that) “the counsel for the prosecution stated, that an assault committed under circumstances of great provocation should be considered by the jury, and that the infirmities of human nature were not to be confounded with the gross and senseless ferocity of a brute. The counsel with great humanity seemed willing to acknowledge *Mr. Stile’s* insanity; but the jury, having their attention directed probably to some other than the lunatic asylum, instantly pronounced him (the plaintiff) guilty, to the great satisfaction of a crowded court. The *Billingsgate* language that was used we have omitted, unwilling to stain our columns with such pollution. Besides, it could be no novelty to a great majority of our numerous readers who have themselves often heard the accomplished and erudite *Mr. Stiles* with astonishment, if not delight or admiration.” The 2d count was for printing and publishing the same libel. And there were two other counts stating the libel generally.

Pleas. 1. The general issue. 2. A justification as to the printing and publishing the several supposed libels; for that at the general quarter sessions in and for the borough of — next before the publishing, &c. to wit, on, &c. a prosecution was brought forward against the plaintiff for an assault upon the said *A. B.*, and that the said assault was stated by the counsel for *A. B.* to have been a savage, unprovoked, and brutal attack upon *A. B.*; and that in the opening the case it was stated, and afterwards clearly and fully established by evidence, that the plaintiff did wantonly and savagely attack *A. B.* at an arbitration. And it appeared that the plaintiff at the said arbitration, in disputing professionally as an attorney, had recourse to blows, which were administered with no ordinary violence or treachery. That *A. B.* being inferior in personal strength to the plaintiff urged him to desist, and at the same time made such declarations as in the supposed libels are in that behalf set forth. That in the course of the trial of the plaintiff for the said assault, one *C. D.* was produced as a witness on behalf of the plaintiff; and that *C. D.* then and there proved that the plaintiff had been repeatedly called and always considered a coward, and that he had heard *E. F.* make mention of his cowardice: and that such words and conversation as are in the supposed libels in this behalf mentioned did thereupon take place between the plaintiff and *E. F.* And that the plaintiff did almost on the instant of being pronounced guilty by the jury go out of court, and was pursued by the hisses of several of the attending spectators, who were not for the moment called to order by the Court. And that *though it clearly appeared by the testimony of every person in the room* where the arbitration was held, *except the plaintiff*, that no violence was used by *A. B.*, nevertheless it appeared that a

violent assault had been sworn against *A. B.* by the plaintiff, and that a bill of indictment had been found by the grand jury upon the evidence of the plaintiff at the preceding sessions for an assault upon the plaintiff. That when the trial of *A. B.* came on, no witness appeared against him: and although the plaintiff in his exculpatory address to the jury expressly mentioned and urged the fact of a bill having been found against *A. B.* for a violent assault upon him, the plaintiff, yet the counsel of the plaintiff, in the supposed libel called his professional associate, said it was not the intention of the plaintiff to proceed against *A. B.* (Here followed the rest of the statement of the counsel omitted in setting forth the libel.) And that *E. F.* in the supposed libels mentioned as counsel for the prosecution did then and there make such statement and observations as are in the supposed libels in that behalf mentioned. That the jury who tried the plaintiff did pronounce him guilty of the assault upon *A. B.* in manner, &c. mentioned. *And that the supposed libels do contain a just and faithful account of the trial of the plaintiff for the said assault, and of the proceedings thereupon:* Wherefore the defendant did print and publish them as he lawfully might, for the cause aforesaid. 3dly, As to the printing and publishing *such parts of the said several supposed libels as purport to contain an account or statement of the trial of the plaintiff at the borough sessions, &c. aforesaid, for an assault upon A. B.; of the trial of A. B. at the same sessions for an assault upon the plaintiff; and of the facts, circumstances, and statements which occurred and were made respectively upon the said trials, the defendant justified:* because before the printing and publishing, &c. viz. on, &c. at the general quarter sessions, &c. the plaintiff was tried and found guilty upon a certain indictment then depending in the said court of an assault upon *A. B.*; and *A. B.* was tried and acquitted upon a certain indictment therein also depending against him for an assault upon the plaintiff; and *that the said parts of the said several supposed libels in the introductory part of this plea mentioned contain a just and faithful account of the said last mentioned trials, and of the facts, circumstances, and statements which respectively occurred, took place, and were made thereupon:* wherefore the defendant printed and published the *said parts, &c.* as he lawfully might for the cause aforesaid, &c. And 4thly, as to the printing and publishing *such parts of the supposed libels as relate to the finding of a bill by the grand jury against A. B. for an assault upon the plaintiff upon the oath of the plaintiff;* the defendant justified, for that before the printing and publishing, &c. to wit, on, &c. at, &c. the plaintiff was tried at the general quarter sessions, &c. upon an indictment therein depending against him for an assault upon *A. B.* at a certain arbitration, &c. And although at such trial it clearly appeared from the testimony of every person that was in the room where the arbitration was held, except the plaintiff, that no violence was used by *A. B.*; yet true it is that a violent assault had been sworn against *A. B.* by the plaintiff before a grand jury at the preceding quarter sessions, &c.; and that a bill of indictment had been in consequence thereof found by the said grand jury against *A. B.* for an assault upon the plaintiff, as in the supposed libel is mentioned. Wherefore, &c.

The replication joined issue on the 1st plea, and demurred to the other pleas: stating for special causes of demurrer to the 3d plea, that it does not appear by the introduction to that plea what it means to justify: that if it go to the printing and publishing of the whole of the libels mentioned in the declaration, the plea is altogether bad and defective: and that if it only go to part of the libels, it is not expressed with sufficient certainty what parts the defendant means to justify: and that it is impossible to separate the several parts of the libels in manner and form as is attempted to be done by that plea: and that it is impossible to take any precise or certain issue thereon. And for special causes of demurrer to the 4th plea, that it does not express with any degree of certainty the parts of the libels which the defendant means to jus-

tify; and that it is impossible to separate the several parts of the libels in manner and form as attempted by that plea; and impossible to take any precise or certain issue thereon, &c. Joinders in demurrer.

Js. Clarke in support of the demurrers. This justification cannot be supported within the principle of the cases which legalize true reports of judicial proceedings; (a) for here extraneous matter is introduced, and the whole account is coloured by the passions and malice of the writer. The first count charges a libel to have been written of the plaintiff in his character of clerk of the Court of Requests, &c.; and yet the justification contains nothing touching that character: it imputes no judicial delinquency to the plaintiff, but merely states an account of an assault by one individual upon another: there could therefore be no ground for the writer of the pretended report to introduce the plaintiff in that character; and consequently, the justification, not answering that part of the charge, is bad. It is also alleged that the libel was written in order to cause it to be suspected and believed that the plaintiff was guilty of perjury; the only justification of which is, that "it appeared by the testimony of every person in the room, &c. (not stating to whom it appeared) that a violent assault had been sworn, &c. The writer states his own conclusion from the facts, instead of stating what the witness swore, and leaving the reader to draw his conclusion; though even if he had stated the whole of what had been sworn, it would at most only have amounted to a case of contradictory testimony, and would not have justified him in imputing perjury to the plaintiff: and it is no justification even to shew that one was found perjured by a verdict unless followed up by judgment, *Jacobs v. Songate*, 1 Brownl. 11. 2 Brownl. 122: but here there was no verdict even to justify the defendant. The whole statement is highly wrought up and coloured by the defendant, and shews upon the very face of it that it was not intended as a fair and impartial account of a judicial proceeding, but must be considered as a composition of his own. It is intitled "*Judicial Delinquency*," and is prefaced by general observations on that head, in which as well as in subsequent parts the writer uses the word *we*, as speaking in his own person to the public. In one place he describes the plaintiff as *our Hero*: and throughout, the account of what is stated to have passed in court is mixed up with matters of description and observation of the writer, which from the nature of them could form no part of a judicial proceeding. As to the ground of special demurrer to the two last pleas, he argued that no issue could be taken upon those pleas; for as to the third, it professed to be a justification of parts only of the libel, without setting forth what parts: and it is not enough to refer generally "to such parts as purport to contain an account of the trial, &c.; because if the defendant meant to justify parts only, he should have stated those parts in his plea, and cannot throw upon the plaintiff the burthen of selecting them, which he cannot do with certainty. And the same observations apply to the 4th plea. The Court then desired to hear

Scarlett, contra. Upon the whole of the pleadings there is no uncertainty. For, first, the plea of the general issue goes to the whole libel, and so does the first justification; and the other justifications apply to particular parts. The first justification states what did actually pass in court on the trials: and if, according to the doctrine laid down in the case of *Astley v. Young*, 2 Burr. 807, and in *Rex v. Wright*, 8 Term Rep. 293, and in other cases there cited, it is no libel to publish a true representation of proceedings in courts of justice, the Court upon comparing the facts stated in the first justification, which stand admitted by the demurrer, with the alleged libel set forth in the declaration, will be able to decide whether the justification cover the whole. But at any rate, the other justifications, being confined to such parts of the libels as the Court shall in their judgment determine to relate to the judicial proceed-

(a) Vide *Rex v. Wright*, 8 Term Rep. 293, and the cases there cited.

ings therein referred to, will be good for so much; and the defence of the rest of the libel will stand upon the general issue. It is sufficient that the defendant justifies all the *facts* alleged in the libel; and as to the application of them to the plaintiff in a judicial or any other character, it is immaterial, provided the publication of such facts, as occur in a judicial proceeding, be justifiable. But *Judicial Delinquency* does not necessarily mean misconduct in the character of a Judge, which character is not filled by the plaintiff, but was merely stated to call the attention of the public to the situation which the plaintiff held as clerk of the Court of Requests. Whether or not the defendant meant to publish a true and fair account of the proceedings in a court of justice, or only intended that as a vehicle for conveying malicious and libellous insinuations against the plaintiff by mixing them with the other, is properly a question for the jury, and might have been tried upon the common replication that he published the libel of his own wrong, and without the cause by him alleged. [Lord *Ellenborough* and *Grose*, J. here observed, that it must not be taken for granted that the publication of every matter which passes in a court of justice, however truly represented, is, under all circumstances, and with whatever motive published, justifiable; but that doctrine must be taken with grains of allowance. It often happens, said Lord *Ellenborough*, that circumstances necessary for the sake of public justice to be disclosed by a witness in a judicial inquiry are very distressing to the feelings of individuals on whom they reflect: and if such circumstances were afterwards wantonly published, I should hesitate to say that such unnecessary publication was not libellous, merely because the matter had been given in evidence in a court of justice.] That would be a question for the jury, whether such a selection had been made and published with a malicious intent, and not with a view to give a *bona fide* representation of the proceedings of the Court. But it was expressly ruled in *Curry v. Walter*, 1 Bos. & Pull. 525, that the publishing a true account of the proceedings of a court of justice, however injurious to the character of an individual, is not libellous. [Lord *Ellenborough*, C. J. The case of *Curry v. Walter* only shews that a fair, plain, unvarnished account of proceedings in a court of justice is not a libel; but not that a highly coloured picture, mixed up with insinuations of perjury, is not a libel. What do you say to the objection that you have not answered the insinuation of perjury?] The libel does not profess to state the fact that no violence was used to the plaintiff by A. B.; but only to represent what passed on the trials.

[Lord *Ellenborough*, C. J. Though the fact be not in terms denied, yet the whole turn of expression is to insinuate that the plaintiff swore falsely; for which you offer no adequate justification. It might have appeared by the testimony of every witness in the room, that no violence was offered by A. B.: and yet the plaintiff might not be guilty of perjury in what he swore. *Grose*, J. You affect to justify an imputation of perjury, and do not. *Lawrence*, J. The facts stated are consistent with the plaintiff's not having committed perjury, but are no justification of the charge insinuated in the libel that he did commit perjury. If the publication had only stated a fair account of the proceedings in court without any comments, the argument might have been well founded: but the writer has introduced his own comments, in which he directly insinuates the commission of perjury by the plaintiff. *Le Blanc*, J. The defendant can only justify by facts and allegations, which, if true, will necessarily acquit him of having falsely inferred the commission of perjury by the plaintiff. In an indictment for perjury the prosecutor does not content himself with stating certain facts, from whence it is to be inferred that what the defendant had before sworn was false, but he goes on to say, *and so* the defendant committed perjury, &c. which is a direct allegation of the offence. So in a justification of a libel imputing perjury, it is no answer to shew that ten persons swore one way, and that one person swore the contrary way, without some allegation of the falsity of the fact sworn to by the latter.]

Scarlett then attempted to support the two last special pleas by saying, that if the Court upon the first special justification saw sufficient ground to sever such parts of the libel as contained an account of the trials from the rest, which was only the comment of the writer, the uncertainty objected to by the plaintiff's counsel as an argument against these pleas was at an end. And according to *Dallison*, 33, where a plea refers to a thing which shews the certainty, it need not be particularly alleged: as if it refer to any matter which appears by the record. And no difficulty could have arisen from taking issue and going to trial on these pleas, because the judge who presided would instruct the jury as to those parts of the libel which were justified, and those which were not; and they would be told to consider the facts justified as true, but to consider also what use had been made of those facts in the extraneous matter added, and which was not justified; which would lessen the damages so much. When called upon however by the Court to separate the parts of the libel, which he meant to justify, he did not succeed in the attempt throughout to the satisfaction of the Court. On which

LORD ELLENBOROUGH, C. J. said, the account of the proceedings in court is so interwoven with the comments that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings. The Court cannot decompose this mass: but the party who requires the separation to be made for his own defence ought to have taken upon himself the burthen of doing it, in order that the Court might see with certainty what parts he meant to justify. I should have great difficulty in saying what parts purport to contain an account of the trial, and what parts are libellous. If they cannot be separated by the industry of the pleader, how can they be so by general reference. If they can be so separated, they ought to have been.

GROSE, J. of the same opinion.

LAWRENCE, J. A general reference to former parts of the record may be sufficient in pleading, without repeating the whole of such parts, where it is a reference to something certain; but the reference here is to parts, which so far from being certain cannot even now be distinctly pointed out. The title at the beginning professes to be the account of the whole trial; but there are parts which manifestly could have no place in a judicial proceeding. Then ought the difficulty of making the separation, which cannot now be satisfactorily solved, to be thrown upon the Court and jury at *Nisi Prius*?

LE BLANC, J. A plea of justification may be good with a general reference to certain parts of the libel set forth in the declaration, if the Court can see with certainty what parts are referred to; as if the reference be to so much of the libel as imputes to the plaintiff such a crime, (*e. g.* perjury) that would be sufficient without repeating all those parts again, which would lead to prolixity of pleading, and ought to be avoided. But here the reference is to nothing which can with certainty be pointed out. (1)

The defendant's counsel then prayed leave to amend, which was denied *per totam curiam*; the Lord Chief Justice saying, that the Court would not assist a person, who, under pretence of publishing the proceedings of courts of justice, published only libels which he could not afterwards justify.

Judgment for the Plaintiff
on the Demurrer. (2)

(1) Vide *Rex v. Fisher & al.*, 2 Campb. 563. *Thomas v. Crosswell*, 7 Johns. 264.

(2) [It seems not to have been expressly decided, whether the publication of defamatory matter embodied in the proceedings of a Court of Justice, is justifiable. In England the inclination of the decisions is adverse to such a privilege. See *Lewis v. Clement*, 3 B. & A. 702. *Lewis v. Walker*, 4 do. 605. *Duncan v. Thwaites*, 3 B. & C. 556, 553. *Flint v. Pike*, 4 do. 473.—W.]

Sir Henry Strachey Bart. and Giles v. Turley, Burt, and Others.

7 East, 507. June 13, 1806.

Where two several petitions signed by different persons, were presented to the House of Commons against the return of Members to serve in Parliament for *East Grinstead*, which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious, the costs cannot be taxed *jointly* under the stat. 28 Geo. 3. c. 52; and therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners, and having afterwards by an amended certificate apportioned how much of the first mentioned sum taxed was incurred by the sitting members in opposing the two petitions, *jointly*, and how much was so incurred by them in opposing each *separately*, the plaintiffs, by the advice of the Court, submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for the separate costs certified against each, as also in a joint action against all to recover the taxation certified against them all *jointly*.

THIS was an action of debt, in which the plaintiffs declared, that the defendants were indebted to them in 13*l.* 2*s.* 6*d.* by virtue of the stat. 28 Geo. 3. c. 52, intituled An Act for the further regulation of the trials of controverted elections or returns of members to serve in parliament; to which the defendants pleaded *nil debent*. There was a similar action by the same plaintiffs for the like sum against *Frost*, with the like plea; and a third similar action by the plaintiffs against *Frost* and *Turley*, and the other defendants named in the first action for 67*l.* 19*s.* 10*d.*, with the like plea. These actions were tried before Lord *Ellenborough*, C. J. at the sittings at *Westminster* after *Michaelmas* term 1805, when a verdict was given for the plaintiffs in each cause for the respective sums therein demanded, subject to the opinion of this Court on the following case.

At the last general election, Sir *Henry Strachey*, Mr. *Giles*, and Mr. *Frost*, were candidates for the borough of *East Grinstead* in *Sussex*, and the two former were returned duly elected. On the 29th of *November* 1802, a petition was presented to the House of Commons, signed by Mr. *Frost* alone, and not by any of the other defendants; complaining of that election and return; which petition stated, that at the last election for the borough of *East Grinstead*, &c. on the 7th of *July* last, the petitioner, Sir *H. Strachey*, and Mr. *Giles*, were candidates to represent the same in parliament. That the right of voting is in the inhabitants paying scot and lot, and the freeholders of the borough. That *G. B.* the bailiff acted as returning officer for the town and borough aforesaid with gross partiality, &c. That a considerable shew of hands appeared in favour of the petitioner; yet that *G. B.* declared the shew of hands to have been in favour of Sir *H. S.* and Mr. *Giles*; and on a poll being demanded, &c. and taken before the said bailiff, a majority of legal votes was polled for or tendered, in favour of the petitioner, over the said Sir *H. S.* and Mr. *G.*, and the petitioner was duly elected, and ought to have been returned one of the burgesses, &c.; but that the bailiff admitted several illegal votes in favour of Sir *H. S.* and Mr. *G.*, and rejected many legal votes tendered in favour of the petitioner; and returned Sir *H. S.* and Mr. *G.* as duly elected, &c. And after alleging corrupt practices against the sitting members, it concluded with praying that the House would take the premises into consideration, and grant him relief, &c. And Mr. *Frost* entered into a recognizance to the King in 200*l.* with two sureties in 100*l.* each, to appear before the House of Commons at the time fixed by the House for taking his petition into consideration; and also to appear before any select committee appointed for the trial of the same, &c. The House of Commons ordered this petition to be taken into consideration upon the 8th of *February*. On the 1st of *December* 1802, a petition was presented to the House,

signed by *J. Burt*, *J. Turley*, and the other defendants in the first action, and several others, stating in like manner the constitution of the borough and right of voting therein, and alleging partiality, &c. in the returning officer; and that he permitted many persons to vote who had no right, and rejected the votes of the petitioners and others who were fully qualified to vote, &c.; and praying relief in the premises. And *J. Burt* (one of the defendants) entered into such recognizance for the trial of the same petition as is by law required, in 200*l.*, with two sureties in 100*l.* each. Mr. *Frost* did not sign this petition. The House of Commons ordered this petition to be taken into consideration at the same time with the petition of Mr. *Frost*; and the select committee was duly ballotted and appointed on the 17th of *March* 1803, for trying and determining the merits of both petitions. On the 4th of *April* 1803, the chairman of the committee reported to the House, that the said committee had determined that Sir *H. S. Bart.* and *D. Giles Esq.*, were duly elected burgesses to serve for the said borough; and that the petition of Mr. *Frost*, and the other petition of *J. Turley*, *J. Burt*, &c. were frivolous and vexatious. These determinations were entered on the journals of the House, and an examined copy of such entry was produced in evidence. On the 15th of *June* 1804, the Speaker signed the following certificate, which was produced in evidence: "Whereas *N. Smith Esq.*, one of the Masters of the high Court of Chancery, and *J. H. Ley Esq.*, Clerk Assistant of the House of Commons, who were duly authorized and directed by me according to the stat. 28 Geo. 3, intituled, &c. to examine and tax the costs and expences of Sir *H. S. Bart.* and *D. Giles Esq.* incurred by them in opposing the petition of *J. Frost Esq.*, and also in opposing the petition of several persons in behalf of themselves and others, electors of *East Grinstead*, &c. presented to the House of Commons, complaining of an undue election and return of them the said Sir *H. S. Bart.* and *D. G. Esq.* as burgesses, &c., have reported to me the amount of such costs and expences: Now I do hereby certify that the said costs and expences allowed in the said report amount to 706*l.* 3*s.* 10*d.*" (Dated) 15th of *June* 1804, (and signed) *Cha. Abbot*, Speaker. A copy of this certificate was served upon the defendant *Frost*, and payment of the costs therein certified to be due was demanded of and refused by him. On the 7th of *May* 1805, the plaintiffs made a further application to the Speaker to ascertain how much of the costs and expences allowed in the certificate amounting to 706*l.* 3*s.* 10*d.* was incurred by the plaintiffs in opposing the said two petitions as they were jointly prosecuted: and how much thereof was incurred by them in opposing each of the said petitions separately prosecuted; who thereupon granted the following certificate, which was produced in evidence.—"Whereas *N. Smith Esq.* one of the Masters, &c. and *J. H. Ley Esq.* Assistant, &c. who were duly authorized and directed by me, according to the stat. 28 G. 3, intituled, &c. to examine and ascertain how much of the costs and expences allowed by them in their report to me, dated the 12th of *June* last, was incurred by Sir *H. S. Bt.* and *D. G. Esq.* or either of them, in opposing the petition of *J. Frost*, Esq. and also the petition of several persons whose names were thereunto subscribed on behalf of themselves and others the electors of the borough of *East Grinstead*, &c. severally complaining of an undue election and return of them the said Sir *H. S.* and *D. G.* for the said borough of *East Grinstead*, as the said two petitions were jointly prosecuted; and how much thereof was incurred by them, or either of them, in opposing each of the said two petitions as separately prosecuted; have made their report to me thereupon: Now I do hereby certify conformably to the said last mentioned report, that the costs and expences incurred by the said Sir *H. S.* and *D. G.* in opposing the petition of *J. F.* separately prosecuted amount to 13*l.* 2*s.*; and in opposing the petition of the several electors of the borough of *East Grinstead* aforesaid separately prosecuted amount to 13*l.* 2*s.*; and that the expences of the said Sir *H. S.* and *D. G.* in opposing the said two petitions jointly prose-

cutted amount to 679*l.* 19*s.* 10*d.*; which said three last mentioned sums make up the sum of 706*l.* 3*s.* 10*d.* as allowed in the said former report made to me on the 12th of *June* last, and certified by me on the 15th of *June* last accordingly." (Dated) 13th of *June* 1805, (signed) *Cha. Abbot*, Speaker. Payment of these several costs were respectively demanded of and refused by the defendants. Whereupon these three actions were brought; one against *Turley* and others, the defendants in the first action, for 13*l.* 2*s.*; in which action *Frost* is not a defendant; one against *Frost* alone for 13*l.* 2*s.*; and the third against *Frost*, *Turley*, and others, for 679*l.* 19*s.* 10*d.* The question for the opinion of the Court, was, Whether the plaintiffs were entitled to recover in all or any of the said actions? if in all, then the verdict to stand: if not in all, but only in two, or one, the verdict to stand in such two, or one: if not entitled to recover in all or any, nonsuits to be entered accordingly.

Wood for the plaintiffs contended, that they were entitled to recover in all the actions. The objections made at the trial were, that as there were two *separate* petitions by *different* petitioners there could not be *joint* costs awarded against all: and that the Speaker having once made his certificate was *functus officio*, and could not make any subsequent certificate amending the one first made. The stat. 10 Geo. 3. c. 16. s. 1, provides, that whenever a petition complaining of an undue election and return shall be presented to the house of Commons a day and hour shall be appointed for taking the same into consideration: and by s. 13, a select committee of thirteen members with two nominees shall be sworn to try the matter of the petition referred to them, and to *try and determine the merits of the return*; and the House shall order the committee to meet for that purpose at a certain time to be fixed; whose determination by s. 18, shall be final. It appears from thence that the whole merits of the election are to be tried by *one* committee only. Then by stat. 11 Geo. 3. c. 42. s. 1, if several parties on *distinct interests or grounds of complaint* shall present *separate* petitions, the same notices and orders shall be given to all such parties, &c. as by the last mentioned act are directed to be given to the sitting members or the petitioners therein mentioned, &c. And by s. 6, if on complaint of an undue election there shall be more than two parties on distinct interests, each party shall strike off a member from the original number of 49 successively, until the number shall be reduced to 13. Thus the formation of the committee is made a joint concern. Lastly, the stat. 28 Geo. 3. c. 52, reciting the two former statutes, and another of the 25 Geo. 3. c. 84, and that it was expedient that further regulations should be made for the execution of those acts, and provision made for discouraging persons from presenting frivolous or vexatious petitions, &c. in any of the cases to which the recited acts relate, enacts, (s. 19,) "That wherever any such committee shall report to the House, with respect to any such *petition*, that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to such *petition*, shall be entitled to recover from the person or persons or any of them who shall have signed such *petition* the full costs and expences which such party or parties shall have incurred in opposing the same: such costs and expences to be ascertained in the manner hereinafter directed." There are corresponding directions for other cases in the 20th and 21st sections. And then by s. 22, it is enacted, "that in the several cases before mentioned the costs and expences of prosecuting or opposing any such *petition* shall be thus ascertained; that on application to the Speaker by any petitioner or petitioners, &c. for ascertaining such costs and expences he shall direct the same to be taxed by two persons, &c. who are thereby required to examine the same and to report the amount thereof to the Speaker, who shall on application deliver to the party or parties a *certificate* signed by himself, expressing the amount of the costs and expences allowed in such report, &c. which costs, if not paid, may by s. 23, be recovered by action

"of debt." And by s. 24, "in every case where the amount of *such costs and expences* shall have been so recovered from any person or persons, it shall and may be lawful for such person or persons to recover in like manner from the other persons or any of them, if such there shall be, who shall be liable to the payment of the *said costs and expences*, a *proportionable share* thereof, according to the number of persons so liable." Here the same select committee having been appointed and sworn to try both petitions, according to the directions of the acts, as involving the merits of the same return, the two became *one joint consolidated petition*, to be determined by one and the same trial. He also referred to the usage of parliament as in favour of this construction; and instanced similar taxations to the present made in the cases of *Bodmin* election in 1791, of *Cricklade* in 1794, and of *Colchester* in 1796. And in answer to an objection thrown out by the Court that the word *petition* was used in the *singular* number throughout the several clauses referred to regulating the taxation of costs, which according to his construction ought to have been *petitions*; he referred to *Schuldham v. Bunniss and another*, Cowp. 192, where a *joint* action was maintained against two bailiffs of a borough for refusing the inspection of books, though the stat. 3 Geo. 3. c. 15, which gives the remedy, mentions *bailiff*, &c. in the singular number.

The Court said, that might be so in a case where the sense of the thing manifestly required it. But here they said, that a certain power was given by statute, which they could not enlarge beyond the plain letter of it, and that power was confined in terms to tax the costs of *such petition* in the singular number throughout: and the 24th section evidently referred to an apportionment between joint petitioners in the same petition. And a contrary construction they thought would work injustice: for it might happen that one person, or set of persons, might petition against a return upon the ground of a single fact in dispute, as that the sitting member was under age, or the like; and another set of petitioners might impeach the election upon the allegation of the bribery and corruption of a majority of the voters; which would make the greatest difference in the costs and expences of those who opposed them: but it would be too much to contend that both sets of petitioners were equally and jointly liable to the whole costs and expences of the defence; and yet both would be interested in disqualifying the sitting member. The similarity of interest, therefore, was no reason for subjecting different sets of petitioners on different grounds to a joint taxation, any more than the reference of the several petitions to the same committee for trial; which was directed for the sake of general convenience; the issue being the same, namely, the validity of the return: but that did not prevent the interests of the respective petitioners being severed afterwards. And such being the opinion of the Court on the original joint taxation, they suggested to the plaintiffs' counsel, whether it might not be more for the interests of his clients to enter a nonsuit in all the actions, since a recovery in the two upon the separate taxation might be set up as a bar to any other action which might hereafter be brought upon a new certificate.

The case stood over for some days to give the plaintiffs time for consideration, and finally they agreed to enter nonsuits in all the actions.(1)

Clifford was to have argued for the defendants.

(1) A new action was afterwards brought, and sustained. See the case reported 11 East, 194.

The Earl of Clanricarde v. Stokes.

7 East, 516. June 13, 1806.

Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute *giving the remedy* as well as to that *creating the offence and giving the penalty*; yet a count for a penalty on the stat. 5 Ann. c. 14, stating that the defendant kept a snare to kill game *against the form of the statute* in such case made, &c. by reason whereof, *and by force of the statute* in such case made, &c. an action hath accrued, &c. is sufficient; for the first statute mentioned refers to the 5 Ann. c. 14, creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 Geo. 3. c. 19, whereby the *whole* penalty is given to the common informer, the half only of which had been given to him by an intervening statute.

IN debt to recover the penalty of 5*l.* created by the stat. 5 Ann. c. 14, the declaration stated, that the defendant within six months next before the exhibiting of the plaintiff's bill, to wit, on the 4th of *Nov.* 1805, at *Exton* in *Hampshire*, did keep a snare to kill and destroy game, the said snare being then and there an engine to kill and destroy the game, against the form of the statute in such case made and provided; the said defendant not being in anywise qualified or having any lawful authority so to do: by reason whereof, and by force of the statute in such case made and provided an action hath accrued to the said plaintiff to demand and have of the defendant 5*l.* *Plea, nil debet.*

After verdict for the plaintiff, it was moved in last *Easter* term to arrest the judgment, and the rule was now supported by

Jekyll and *Dampier*, on the ground that the penalty and the remedy by action were given by several different statutes, viz. the penalty by stat. 5 Ann. c. 14, (a) made perpetual by stat. 9 Ann. c. 25, which so far may be considered for this purpose as one act;) and the remedy by three statutes, first by the stat. 8 Geo. 1. c. 19, substituting the action (which is to be brought before the end of the next term after the offence,) for the information before justices under the stat. 5 Ann., and giving half the penalty to the common informer; next, by the stat. 26 Geo. 2. c. 2, which extends the time for bringing the action to two terms after the offence committed; and lastly, by the stat. 2 Geo. 3. c. 19, which gives the whole penalty (sought to be recovered in this action) to the informer, and extends the time for bringing the action to six months after the offence committed, but without repealing the statute of the 26 Geo. 2. c. 2: the offence therefore, they contended, ought to have been laid against the statutes, in the plural, and not, as it is here laid, "against the form of the statute." And this objection, it was said, was not aided by the conclusion of the count, "by reason *whereof*, and by force of the statute, &c. an action hath accrued;" for either *the statute* there mentioned must mean the same statute referred to in the former part of the count, or at any rate it can only refer to one of the three statutes last mentioned: whereas the right of suing for the whole penalty by a common informer must depend upon two at least, the 8 Geo. 1, and 2 Geo. 3, if not also upon the 26 Geo. 2. And the case of *Lee v. Clarke*, 2 East, 333, was cited, where the same objection (amongst others) was taken and countenanced by the Court; and in which *Dingley v. Moore*, Cro. Eliz. 750, and *Broughton v. Moore*, Cro. Jac. 142, were cited, which are full to the present point, as well as what was said by *Warburton, J.* in *Rex v. West, Owen*, 135. And they contended, that where an offence was created by a statute inflicting a penalty, which did not exist at common law, and an action is afterwards given to a common informer, it is as necessary that the Court should be referred to the statute or statutes giving the remedy as to the statute creating the offence:

(a) This gave the remedy by conviction before a justice of peace.

for otherwise, if instead of a general reference to "the statute in such case made," the count referred to the statute 5 Ann., the Court would not see that a right to sue had *thereby* accrued to the plaintiff: and the Court cannot without such reference intend that an action is given to a common informer; for *prima facie* the penalty would belong to the Crown.

Burrough and *Gaselee* shewed cause, and argued that, as the statute 5 Ann. c. 14, alone creates the offence and gives the penalty, the offence is properly laid to be against the form of the statute, according to the authorities mentioned: to which may be added *Plowden*, 206: and that, notwithstanding a continuing, or as is said by *Warburton*, J. in *Owen*, 335, even a reviving statute; though here the stat. 9 Ann. c. 25, which perpetuates the former act passed before it expired. (a) And it makes no difference that the action is given by another statute. It was not necessary for the count to refer at all to the statute which gives the remedy to the common informer; for, being a public statute, the Court are bound to notice it: and it being stated that the action was brought within six months, and the penalty being given to him who sues, the bringing the action shews a sufficient title in the plaintiff. It is only necessary to refer to the statute creating the offence and giving the penalty: all the rest may be rejected as surplusage: and the count might have concluded that "by reason whereof, (without adding "and by the force of the statute,") an action hath accrued," &c. *Lutw.* 132, 3, 8. 164, 166. 190, 3. 208. 221. *Lill. Entr.* 148. 175. 222. 255. *Co. Entr.* 159. 161, 2, 3, 4, and 5. But the addition of *contra formam statuti*, though not necessary, will not hurt, according to *Bennett v. Talbois*, 1 *Ld. Ray.* 149. But supposing it to be necessary to refer to the statute giving the action, such reference is to be found in the words of the count, "and by force of the statute," &c.; referring to the stat. 2 Geo. 3. c. 19. s. 5, which must be construed *reddendo singula singulis*, and gives an action of debt or on the case, &c. and enables the informer to sue for the whole penalty to his own use within six months. It would then stand thus, that the allegation of the offence being committed against the form of the statute would refer to the stat. 5 Ann. c. 14, which creates the offence and gives the penalty; and the subsequent words "by reason whereof," would refer to the same statute; and the words, "and by force of the statute, &c. an action hath accrued," &c. would refer to the statute 2 Geo. 3. c. 19. The case of *Lee v. Clarke* did not turn on this point; [*Lawrence*, J. It was not alleged there, that he used the snare against the form of the statute.] And this is distinguishable from *Dingley v. Moore*, *Cro. Eliz.* 750, where the information was upon the statute 33 Hen. 8. c. 16, for buying worsted yarn within the county of *Norfolk*, not being a weaver, &c.; which act was continued by stat. 1 Ed. 6. c. 6, only in respect of yarn *spun of the rock*, but not for other yarn; and therefore the information was quashed, not because it was only laid *contra formam statuti*, but because it did not shew that it was *yarn spun of the rock*; for otherwise it was no offence. And *Shelton's* case for recusancy, there relied on, where the objection prevailed that it was not laid *contra formam statutorum*, was where the offence was created by the stat. 1 Eliz. c. 2, and the penalty given by statute 23 Eliz. c. 1, against such as refused to go to church against the form of the stat. 1 Eliz. And *Broughton v. Moore*, *Cro. Jac.* 142, went on the same distinction.

It was asked by *Lord Ellenborough* of the defendant's counsel in the course of the argument, whether they had found any express authority for saying that the count must refer to the statute giving the remedy, as well as to that creating the offence and giving the penalty? To which they answered in the negative; but contended that it was equally necessary upon principle for the reasons before urged. And at the conclusion,

The Court, assuming it to be necessary to borrow the aid of two statutes

(a) Vide 2 *Hawk.* c. 25. s. 117.

in order to sustain the action, viz. the stat. 5 Ann. c. 14, creating the offence and giving the penalty, (on which statute alone the criminal part of the charge rested;) and the stat. 2 Geo. 3. c. 19, giving the remedy; (which latter, they thought, alone gave the remedy, without reference either to the statute 8 Geo. 1. or the statute 26 Geo. 2, inasmuch as it gave the whole penalty to the informer, and not merely the other half in addition to the one half before given by the statute 8 Geo. 1.) yet observed, that here there was a sufficient reference in the count to the two first mentioned statutes: and that if, instead of the general form of declaring by reference to "the statute in such case made," &c., the particular statute were referred to by name, the count would run thus, that the defendant committed the offence (stating it) against the form of the statute 5 Ann. &c.; by reason whereof, and by force of the stat. 2 Geo. 3, an action hath accrued, &c. There was therefore no ground for the objection in arrest of judgment.

Rule discharged.

The King v. The Marquis of Stafford and Others.

7 East, 521. June 16, 1806.

One having an only child *Rebecca*, who was married and had three children, *Thomas*, *Rebecca*, and *Ann*, devised his copyholds to *Rebecca* his daughter for life, remainder to his grand-daughter *Rebecca*, for life, remainder to trustees to preserve contingent remainders, remainder to the use of the issue of the body of his grand-daughter *Rebecca* in such parts, shares, and proportions, manner and form, as she should by deed or will appoint: and in default of appointment to the use of all and every the children of his said grand-daughter and their heirs, as tenants in common and, in default of such issue, to the use of all and every the other children of his daughter *Rebecca* and their heirs as tenants in common, &c.; and in default of such issue, to his own right heirs: held that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitation to the other children of the testator's daughter *Rebecca* did not take effect; for the devise to the children of his grand-daughter *Rebecca* and their heirs prima facie carries a fee; and the subsequent words "in default of such issue," refer to her children and not to their heirs; though the limitation over in default of such issue be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the deviser that her children, if any, should take a fee is further evinced by this, that the limitation to them and their heirs is in default of appointment under a power given to her to appoint "to the use of the issue of her body in such manner and form (as well as in such parts, shares, and proportions) as she should direct;" under which words manner and form she might have appointed to all or any of her children in fee, and was not restrained to appoint to them in tail only; which limitation, in default of appointment, is a substitution for the execution of the power.

ON a motion for a *mandamus* to the lords and steward of the manor of *Chertsey Bemond*, in the county of *Surry*, to admit *Thomas Hoade* to the entirety of certain copyholds holden of the said manor, it was by the permission of the Court, and with the consent of *John Acton* (the person interested in resisting the rule,) agreed that the facts might be stated in the form of a special case, for the opinion of the Court; and that the issuing of a peremptory writ of *mandamus* should depend upon their opinion, whether the said *Thomas Hoade* were entitled to the entirety of such premises, or only to an undivided moiety of them, as tenant in common in tail with the said *John Acton*. The facts agreed on were these. On the 2d of February 1780, *William Goring*, being seised of the premises in question, and having surrendered them to the use of his will, and having an only child, *Rebecca*, the wife of *John Hoade*, by his last will, duly executed, devised the same as follows: "I give and devise unto my daughter, *Rebecca Hoade*, all that my messuage, with the appurtenances, situate and being in *Chertsey*, on the east side of a street there called

Windsor Street, and now in the occupation of *J. Cobb*, and also my copyhold lands in *Chertsey* aforesaid, called *Dubles-Brooks*, to hold to her and her assigns during her natural life; and from and after her decease, I give and devise the said messuage and lands unto my grand-daughter, *Rebecca Hoade*, and her assigns, during her natural life; and from and after the determination of that estate, I give and devise the said messuage and lands unto *F. H.* and *J. H.* and their heirs, during the life of my said grand-daughter, *Rebecca Hoade*, upon trust to preserve the contingent remainders hereinafter limited, &c.: and from and after the determination of that estate, to the use and behoof of the lawful issue of the body of the said *Rebecca Hoade*, in such parts, shares, and proportions, manner and form, as the said *Rebecca Hoade*, my grand-daughter, whether sole or married, shall by her last will and testament in writing, attested by 3 or more credible witnesses, or by any deed or writing purporting to be her last will and testament, to be executed in the presence of the like number of witnesses, direct, will, limit, or appoint the same: and in default of such direction, &c. or appointment, "To the use and behoof of all "and every the children of my said grand-daughter, *Rebecca Hoade*, lawfully "to be begotten, and their heirs, as tenants in common, and not as joint "tenants; and, in default of such issue, to the use and behoof of all and every "the other children of my said daughter, *Rebecca*, by the said *John Hoade*, "begotten or to be begotten, and their heirs, as tenants in common, and not "as joint tenants: and in default of such issue, to the use of my own right "heirs forever." The testator died in 1780, leaving the said *Rebecca Hoade*, his daughter, and also the said *Rebecca Hoade*, the grand-daughter and devisee, and two other grand children, viz. *Thomas Hoade*, the prosecutor of the *mandamus* and *Ann Hoade*, (who afterwards intermarried with *Samuel Acton*, who is since dead, leaving the said *John Acton*, her only son), the brother and sister of the said *Rebecca Hoade*, the grand-daughter. Mrs. *Hoade*, the daughter, held the premises in question from the testator's decease till her death in 1790, when her daughter, *Rebecca*, took possession. The last named *Rebecca* married *Benjamin Bailey*, who died in 1796, and she herself died in 1797, without having made any effectual direction or appointment of such premises; leaving an only child, *Mary Ann Bailey*, who by her guardian received the rents, but was never admitted, and died an infant, without issue, on the 15th February 1802. The prosecutor is her maternal heir at law. *Ann Acton*, survived her sister, *Rebecca Bailey*, and died in the lifetime of *Mary Ann Bailey*; leaving the above *John Acton*, her only son; who on the 24th January 1804, was admitted (by his guardian) to an undivided moiety of the said copyhold premises.

This case was argued on a former day in this term, by *Marryat*, on the part of the prosecutor, *Thomas Hoade*, who claimed as heir at law of the infant, *Mary Ann Bailey*, in whom he contended that the absolute fee vested under the limitation in default of appointment, to the children of the testator's grand-daughter, *Rebecca Hoade*, and their heirs, &c. and by *Sir V. Gibbs*, on the parts of the defendants nominally, but in effect on the part of *John Acton*, who claimed as tenant in common in tail of an undivided moiety with *Thomas Hoade*, under the subsequent limitation, "in default of such issue, to the use "of all and every the other children of the testator's daughter, *Rebecca* &c." The Court, in giving judgment on this day, having noticed the principal arguments and authorities referred to at the bar, it is unnecessary to repeat them.

LORD ELLENBOROUGH, C. J. In this, as in all other cases respecting the construction of wills, our object must be to discover what was the intent of the testator, as it is to be collected from the words he has made use of; and it has been properly said, that such construction must be put on the words "in default of such issue," on which the present question arises, as will best effectuate the intention of the testator; which *Sir V. Gibbs* has contended clearly to be, that the estate in question should go over to *Thomas Hoade* and

Ann Acton, "the other children of his daughter, *Rebecca*," if his grand-daughter *Rebecca Bailey's* children should die before they arrived at an age to dispose of it. And this, he says, will be effected by giving *Rebecca Bailey's* children an estate tail, with a remainder to the children of *Rebecca Hoade*, her mother. And upon this argument the question arises, whether there be words in the will to shew such intent? Now there can be no doubt but that the words, according to the common and ordinary legal use of them, most distinctly give a fee. For the devise is in these terms, "To the use and behoof "of all and every the children of my grand-daughter, *Rebecca Hoade*, and "their heirs; and, in default of such issue, to the use of all and every the "other children of my said daughter *Rebecca*;" without any thing being expressly said as to the time of the failure of such issue: And it is but by inference from the limitation over being in default of issue, that it is contended, that the testator meant his other grand-children should take, if the children of his grand-daughter *Rebecca* should die during their minority. Had the testator been told, that if he gave the children of his grand-daughter, *Rebecca*, a fee, and they should die during their minorities, that his estate would go to the eldest son of his daughter, *Rebecca*, to the exclusion of her other children, it is not improbable but he might have said, that is not my intent. But there is nothing in this will to enable us certainly to say, whether such event were or were not in his contemplation. If it were, may it not be fairly concluded, by his not expressly providing for it, that he thought the event not likely to happen, and on that account not worth his while to provide against: or, supposing him not to have contemplated it at all, why might not his intention be to give his grand-daughter's children a fee, if she had any; and if she had none, that in such event the other children of his daughter should take the estate? Thus it would stand, if the devise to the children of his grand-daughter, *Rebecca*, were an immediate devise; but that is not the case; for the devise to them is in default of the execution of a power of appointment given to the mother, enabling her to appoint the estate "to the use and behoof of the lawful issue of her body, "in such parts, shares and proportions, manner and form," as she should by will or deed direct. This, in the course of the argument, was said, but not much pressed, to be only a power to appoint to her children in tail; and if that were so, it would furnish an inference that the limitations which were to take place in default of appointment were intended to be of the same nature. But we think that this devise gave a power to appoint in fee; for admitting that there might be ground to contend that the power was only to appoint in tail, if the power of appointment had only been "to the use of her lawful issue in such parts, shares, "and proportions, as she should direct;" upon which it is not to be understood that we give any opinion; yet when the words, "*manner and form*," are added, there can be no doubt but that in order to give them some effect, (and every word, if it can, ought to be made operative,) something more must be understood than merely a power of unequal division of an estate to be limited in a certain course of descent: and if they do mean any thing beyond a power of division, they must import a power of determining the nature and quantity of the estate the issue should take: and if so, the mother might appoint estates in fee to all or any of her children, which, if they died in their minorities, might go to their uncle, *Thomas Hoade*, as their heir at law, in exclusion of their aunt, *Ann Acton*. And as, under this power, the issue of *Rebecca Bailey* might, according to what must be taken to be the intention of the testator, have had estates in fee given them, how can we say that by a limitation, which was meant as a substitution for the execution of the power, the testator did not intend to give as large an estate in all respects as could be appointed under the power? and it is most natural and rational to conclude that he so intended. The whole argument in this case has rested in applying the words, "in default of such issue," to the children of *Rebecca Bailey*, and

their issue: but this construction did not prevail in *Goodright v. Dunham*, Doug. 264, nor in *Doe v. Perryn*, 3 Term Rep. 484; though the authority of *Ives v. Legg*, relied on in this case, was pressed on the attention of the court in that. In the latter of the two cases above mentioned, viz. *Doe v. Perryn*, Mr. Justice Buller laid it down that *children* and *issue* were synonymous: and both he and Lord Kenyon distinguished *Legg v. Ives* from *Doe v. Perryn*, by reason of the limitation over in that case being *in default of issue*, which was properly referable to the word *children*, and not to *heirs*; but in *Ives v. Legg*, the limitation over was *in default thereof*, which might well be referred to the word *heirs*. In the case of *Goodright v. Dunham*, the limitation over was, "*if he die without issue*," which was referred to *children*: and it has been said, that this distinguishes that case from this, where the words are, "*and in default of such issue*:" but this is a distinction without a difference; for the one expression as well as the other might, under the same circumstances, mean an indefinite failure of issue; and if so, why may not the one have the same construction with the other under different circumstances equally attending both? In commenting upon these cases various observations were made on different parts of the wills in those cases, which had weight in determining their construction; such as the *Leasing Power*, in *Doe v. Perryn*, and the addition of the words *for ever* after the word *heirs*; which circumstances are not to be found in the case before us. It is true, that those circumstances are wanting; but they are not circumstances on which any very material reliance can be placed: and there exists in this case (if such further circumstance be wanting) another which has more weight, (which has indeed been observed upon already;) namely, a power of appointment in the mother, enabling her to give a fee, for which the limitation in question is only a substitution. As to the case of *Lewis ex dem Ormond v. Waters*, lately determined in this Court, (6 East's Rep. 336,) where the words, "*for want of such issue*," were referred to the word *heirs*, that was not determined on the ground of those words being on their ordinary and proper sense referable to the word *heirs*; but on this, that it was clear the testator meant that the first and other sons of his eldest son should take estates in succession in remainder: which they could only do by taking estates-tail: and if so, the words "*for want of such issue*" were properly used to denote the determination of such estates, in order to introduce other limitations dependant upon them. For these reasons we are of opinion, that a peremptory *mandamus* should go, to admit *Thomas Hoade*, the heir at law of the deceased only child of the grand-daughter *Rebecca Bailey*, to the estate in question.

Rule absolute.

Horn, Executrix of Horn, v. Horn and Another.

7 East, 529. June 17, 1806.

The annuity act 17 Geo. 3. c. 26, as appears from the whole purview of it, is confined throughout to annuities granted upon *pecuniary* consideration, though the first clause, in the terms of it, requires a memorial of *every* annuity bond, &c. to be inrolled: it is not enough therefore for the defendant to plead generally to an action on a bond conditioned for the payment of an annuity, the consideration whereof does not appear upon the face of the bond or condition set forth upon oyer, that it was sealed and delivered *after* the passing of the act and that *no memorial* of it was enrolled; without shewing that the consideration was *pecuniary*; but such general plea is bad on demurrer.

TO debt on two bonds, one for the penal sum of 3630*l.*, the other for the penal sum of 5000*l.*, the defendants, after craving oyer of the first bond and of the condition, by which it appeared to be a bond conditioned for the payment to the testator, &c. of 1815*l.* on the 1st of Sept. 1801, with lawful inte-

rest from the 1st of *March* preceding; and after craving oyer of the second bond and of the condition, by which it appeared to be a bond conditioned for the payment to the testator, his executors, &c. during the lives of him and his wife (the plaintiff) and the survivor, an annuity of 600*l.*; pleaded *non est factum* to both bonds. There then followed several pleas alleging that the two bonds, and each of them, were given on the several usurious considerations therein set forth; one of which (whereby the nature of the transaction will appear) stated, that before the making of the same writing obligatory, viz. on the 24th of *February* 1801, *John Horn* (the testator,) and one *Robert Horn*, and *Wm. Horn* (one of the defendants) were copartners, as distillers. That on the 1st of *March* 1801, before the bonds given, *Robert Horn* ceased to be a partner; and on the 20th of *March* 1801, the testator was desirous of withdrawing himself from the partnership, in order that the same business might be carried on by the defendants together upon certain terms to be agreed upon. And that on the said 20th of *March*, before the bonds given, it was corruptly agreed between the testator and the defendants, that the testator should withdraw from the said business as from the 1st of *March* preceding in favour of the defendants, and permit them to occupy and enjoy a certain distill house and other premises, and certain utensils of trade therein, in consideration of an annuity of 600*l.* to be paid to the testator, his executors, &c. during the lives of himself and his wife, and the survivor of them: and that the defendants should take the debts owing to the late partnership; and that the horses, drays, &c. (*Robert Horn* having consented thereto) of the late partnership should be purchased by the defendants for 1815*l.*; which sum the testator should lend to the defendants, and should forbear and give day of payment for the same to them from the said 20th of *March* 1801 until the 1st of *September* 1801, for which they should pay him interest at the rate of 5*l.* per cent. as from the 1st of *March* 1801 to the said 1st of *September*; although the said 1815*l.* were not lent till after the said 1st of *March*, &c.; and although 900*l.*, part of the said debts, were not received by the defendants till long after, &c. And then it alleged, that the first bond for 3630*l.* and the other bond for 5000*l.* conditioned to secure the said annuity of 600*l.* were given in consideration of and to secure the said usurious agreement. And lastly, (as to the annuity bond) the defendants pleaded, that the said writing obligatory, with the condition thereof, was sealed and delivered *after the passing of the stat. 17 Geo. 3. c. 26*, (the annuity act) viz. on the 20th of *March* 1801, and that *no memorial* of the same was within 20 days of the execution thereof inrolled in the Court of Chancery as required by the act, by reason whereof the said writing obligatory is null and void. The replication took issues on the usurious agreements alleged in the former pleas, and demurred generally to the last plea.

Burrough, in support of the demurrer relied upon the cases of *Crespigny v. Whittenoom*, 4 Term Rep. 790, and *Hutton v. Lewis*, 5 Term Rep. 639, as shewing that the 8th clause of the annuity act, which says that it shall not extend "to any voluntary annuity granted without regard to *pecuniary* consideration," was not merely an exception to the generality of the first clause, requiring a memorial of *every* annuity to be inrolled; but that the first clause itself, construed and explained as it was by the preamble, and by the 3d, 4th, 7th, and 8th clauses, applied only to annuities granted upon *pecuniary* considerations, and not to all annuities: and therefore, as the consideration did not appear upon the face of the bond or of the condition, set forth upon oyer, it was necessary for the defendants to shew in pleading that the consideration was *pecuniary*; without which the want of a memorial, objected to in the last plea, was no bar to the action. In *Praed v. The Duchess of Cumberland*, 4 Term Rep. 585, and 2 H. Blac. 280, where there was a similar plea, it appeared upon oyer of the condition that the consideration of the annuity bond was *pecuniary*. Then, according to the rule of pleading in the third resolution of *Whelpdale's* case, 5 Rep. 119, where a bond or other writing is

avoided by act of parliament, the party who would avoid it cannot plead *non est factum*, but must plead the special matter.

Littledale contra, admitting that by the received construction of the annuity act taken altogether, if the consideration were not pecuniary, the case was taken out of the generality of the first clause, contended that it was not necessary for the defendants in their plea to allege that the consideration was pecuniary, but that it was sufficient for them to bring the case within the general words of the first clause of the act, which extends to every bond given to secure an annuity; and it lay upon the other side to shew in reply that the consideration was such as that the statute did not attach upon it. As it is said in *Plowd. 376*, that where the body of an act is general, he who would bring his case within an exception must plead it specially.

Lord ELLENBOROUGH, C. J. That is the case where the body of an act is general, and an exception to that generality is afterwards introduced by way of proviso or exception: but here the body of the act is not general; but, as Lord *Kenyon* observed in *Crespigny v. Wittenoom*, it is to be gathered from the whole purview of the act that it was only meant to apply to annuities granted upon pecuniary considerations: and the last section is introduced only *ex abundanti cautela*, and not by way of proviso or exception to the general enactment. The whole range of the act shews this. It is not necessary to stand upon the first clause alone; though even on the construction of that clause I think it may be so confined: but the meaning of the Legislature appears still clearer as you advance to the 2d clause, and the perusal of the third leaves no doubt; and when you come to the 8th clause it is matter of surprise how the construction could ever have been doubted.

Per Curiam,

Judgment for the Plaintiff
on the demurrer.

Still v. Walls and Harris.

7 East, 533. June 17, 1806.

The stat. 13 Geo. 3. c. 80, gives a penalty in case of killing game on a *Sunday* and directs that it shall be forthwith paid on conviction; and that in case of neglect or refusal to pay or give security for the payment of it, the justice shall, by warrant under his hand and seal, cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such order to detain in custody until the return of the warrant of distress may be by *parol*.

IN an action for an assault and false imprisonment, to which the defendant pleaded the general issue, it appeared in evidence for the plaintiff before *Heath, J.* at the last *Maidstone* assizes, that the defendant *Walls*, as head-borough of *Cowdend* in the county of *Kent*, and *Harris* as his assistant, arrested the plaintiff some day in *January* 1805, between 3 and 4 o'clock in the afternoon, and detained him in their custody till the evening of the next day, when they carried him before Mr. *Allnutt*, a justice of peace for that county, who then discharged him. A demand of the copy of the warrant by which the plaintiff had been apprehended was then proved by his attorney, but no copy was given. On the other hand, Mr. *Allnutt* the magistrate deposed, that an information was laid before him by one *Bellenden* against the plaintiff for killing game on a *Sunday*, against the stat. 13 Geo. 3. c. 80. s. 6, (a) founded on the prior stat. 10 Geo. 3. c. 19. s. 2, (which information

(a) The act of the 10 Geo. 3, directs that "in case such penalty shall not be forthwith paid, such justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods, &c. And in case no sufficient distress can be had such justice shall commit the offender to the common gaol,"

was read in evidence.) That he accordingly summoned the plaintiff, who appeared before him, and convicted him of the penalty specified in the act ; which the plaintiff declaring himself unable to pay, the magistrate issued a warrant of distress returnable the next day, and *verbally* directed the defendants to detain the plaintiff in custody until it could be known whether a sufficient distress could be levied on the plaintiff's goods. The plaintiff however paid the penalty the next day, and was then discharged. It was objected that the magistrate was not authorized by the statute to commit the plaintiff *by parol*: if he were so authorized, a nonsuit was to be entered; otherwise a verdict for 40s. given by the jury was to stand.

Garrow and *Espinasse* now shewed cause against a rule for entering a nonsuit, and referred to the rule laid down by *Hawkins*, Hawk. ch. 16. s. 13, that every commitment must be in *writing*, under the hand and seal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, and must be directed to the gaoler or keeper of the prison. And contended, that the *order* of the justices, spoken of in the stat. 13 Geo. 3. c. 80. s. 4, to detain the offender in custody till the return of the warrant of distress, must be understood of an order of commitment in the usual legal form, namely, an order *in writing*, &c. That this was confirmed by the general provisions of the stat. 24 Geo. 2. c. 44, whereby no action shall be brought against any constable or other officer acting in obedience to a justice's warrant until demand and refusal for six days of the perusal, and of a copy of the warrant; the production of which warrant is a justification to the officer: the object of which regulation is to give some certain remedy against the magistrate himself, who is thereby made responsible for the legality of the arrest. But if a commitment by parol may be justified, great mischief and uncertainty will be introduced, and the checks intended by the legislature in favour of the liberty of the subject will be eluded. They also suggested that the proper course would have been for the magistrate to have made out his warrant in the alternative; i. e. to distrain for the penalty, if a sufficient distress could be found; or otherwise, to commit the party.

Bayley, Serjt. and *Taddy* were to have supported the rule; but

The Court were all satisfied, that under the act of the 13 Geo. 3. c. 80, the magistrate might legally authorize by parol the defendants to detain the plaintiff in custody till the return of the warrant of distress. They also said, that the commitments spoken of by *Hawkins* in the passage cited meant commitments to the custody of sheriffs, gaolers, &c. For it never could be doubted but that a magistrate might by parol order an offender to be detained in custody until he could make out his warrant of commitment: and this Court were in the constant habit of directing commitments verbally, which were

&c. But that act is repealed by the 13 Geo. 3. c. 80. s. 5, in all its provisions. But by s. 6, of the latter statute any person killing game, on a *Sunday*, "being convicted thereof in the manner and form prescribed by this act, shall be subjected to the like forfeitures and penalties as are herein before enacted to be inflicted for other offences against this act." The 1st section relates only to so much of the stat. 10 Geo. 3, as provides against destroying game in the night, for which it inflicts certain penalties on conviction for a first, second, and third offence. Sect. 2, gives a form of conviction; s. 3, directs the clerk of the peace to give a copy of the conviction; and s. 4, enacts, "That the pecuniary penalties hereby to be incurred and made payable upon any conviction, &c. shall be forthwith paid by the person convicted, &c. And in case such person shall refuse or neglect to pay the same, or to give security for the payment thereof, such justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods," &c. And then it proceeds, "and it shall and may be lawful for such justice to order such offender to be detained in safe custody until return may conveniently be had and made to such warrant of distress, unless the party so convicted shall give sufficient security for his appearance, &c. But if upon such return no sufficient distress can be had, then and in such case the said justice shall and may commit such offender," &c.

afterwards recorded. So a magistrate in the case of a breach of the peace within the view might instantly order the offender to be taken into custody: otherwise in the case of a sudden affray, all the powers of the King's commission might be in abeyance for want of pen, ink, and paper. That there was nothing in the act requiring the authority to distrain, and to commit if there were no sufficient distress, to be by the same warrant: and the Lord Chief Justice thought that, according to the wording of the act, the authority was rather more properly executed by separate warrants.

Rule absolute for entering a nonsuit.

Toms v. Powell.

7 East, 536. June 17, 1806.

Where the debt was paid after an *alias pluries* writ issued, the defendant cannot object at the trial that the *latitat* was not returned; for at any rate if the *alias pluries* writ were the commencement of the action, it is only an irregularity; which, though a ground for application to the Court to set aside the proceedings, yet, having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial, that when the debt was paid the defendant had no notice of any action commenced or costs incurred.

ASSUMPSIT for goods sold and delivered. *Plea, non assumpsit.* At the trial before *Heath, J.* at the last *Surry* assizes, the plaintiff's demand for the goods was admitted to the amount of 6*l.* 10*s.* 1*d.*; and the only question was, whether the defendant had not paid for them before the action was commenced. The plaintiff sued out his first writ, dated 22d of *June* 1805, which was not proved to have been returned; his second writ, an *alias*, on the 25th of *June*, and an *alias pluries* returnable in *Michaelmas* term, and served on the 26th of *August*. After the issuing of the last writ, and before the service of it, the defendant paid the plaintiff his full demand for the goods; but no mention whatever was made of the costs at that time; which, it was now insisted, ought also to have been paid. The jury found a verdict for the plaintiff with nominal damages; and the defendant had leave to move to enter a nonsuit, if the Court should be of opinion with him.

Bowen moved, in *Easter* term last, to enter a nonsuit, 1st, on the ground that for want of shewing the return of the writ of *latitat*, there was nothing whereon to found the *alias pluries* writ, and therefore no proper commencement of the action shewn before the debt was paid. And he referred to *Harris* q. t. v. *Woolford*, 6 Term Rep. 617, where it was holden necessary to shew the return as well as the suing out of the first writ, in order to save the statute of limitations. 2dly, That the debt was paid by the defendant without any knowledge of an action commenced; and that the receipt of it by the plaintiff without any demand for costs was a waiver of them on his part. The Court however granted a rule *nisi* on the first ground only; saying that the last ground of objection, however it might have induced the court on application to stay the proceedings, was no defence at the trial. And now,

Lawes, on shewing cause, having observed that the debt was not paid till after the issuing of the *alias pluries* writ, the irregularity of which, supposing the first writ had not been returned, was cured by appearance, and could not be objected to at *nisi prius*;

The Court, without hearing any further argument, agreed that if the *latitat* were not to be considered as the commencement of the suit for want of its being returned, at any rate the subsequent process, to which the defendant had appeared, was to be so considered: and the debt not having been paid till after the suing out of that process, the plaintiff was entitled to a verdict for the recovery of his costs. They added, that the defendant should have applied

to the Court in the first instance to stay the proceedings, instead of going to trial. And *Lawrence*, J. observed, that this was very different from the case of *Harris v. Woolford*, where in order to avoid the statute of limitations it was necessary to connect the *alias writ* with the original writ of *latitat*, in order to shew that the action was commenced within time; which could not be done without shewing the return of the first writ. That case would have applied more to the present if the defendant had paid the debt after the issuing of the *latitat*, but before the issuing of the *alias pluries writ*; for then in order to have entitled himself to the costs, the plaintiff must have shewn the commencement of the action before the payment of the debt by the return of the *latitat*. But here the debt was not paid till after the *alias pluries writ* issued, to which the defendant appeared. And if that were not a proper commencement of the action, the defendant should have applied to the Court to set aside the proceedings for irregularity: but having waived the irregularity, he cannot afterwards object to it.

Rule discharged. (a)

The King v. The Inhabitants of Leigh.

7 East, 539. June 18, 1806.

Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place, and on his return the master, on some trivial pretence, said he should not stay any longer in his service, and offered him a trifle less than his whole wages; which the servant refused; but was then ready to have accepted his whole wages, though he would rather have staid out his year; and immediately applied to a magistrate to oblige his master either to pay him the whole, or to receive him into his service for the remainder of the year; when the magistrate ordered half a crown to be deducted; and the servant thereupon hired himself to another master, before his first year was out; and after the year received from his first master his whole wages: Held that this was a dissolution of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service.

TWO justices by an order removed *John Brazier*, *Hannah* his wife, and their four children, by name, from the parish of *Leigh* to the parish of *Clifton-upon-Teame*, both in the county of *Worcester*. The sessions on appeal quashed the order, subject to the opinion of this Court on the following case.

The pauper *John Brazier*, being legally settled in *Clifton-upon-Teame*, on the 31st of *March* 1795, hired himself as a servant in husbandry for a year to *S. Jones* of the parish of *Lulsley*, and agreed for 6*l.* 10*s.* for the year's service. The pauper resided at *Lulsley* in *Jones's* service from thence until the 25th of *March* 1796; upon which day, by permission of his master, and for the purpose of seeking a new service for the ensuing year, he went to the Mop (a meeting for the purpose of hiring servants) at *Bromyard*, six miles from *Lulsley*. The pauper did not return to his master's house till three o'clock in the morning of the 26th of *March*, when he came home with some ribbons in his hat, which he had purchased. In the course of the morning of the 26th his master came to him, and observed, "he supposed masters were scarce at the Mop, and that he had enlisted for a soldier, and told the pauper he should stay no longer in his service." The pauper told his master he had not enlisted, (which was the fact,) and that he wished to stay his year out. But the master said he would not keep the pauper any longer in his service, and the pauper should stay no longer; and at the same time offered the pauper as wages for the time he had served something less than 6*l.* 10*s.*, which the pauper refused to accept. The pauper said he would have accepted the full year's wages if then tendered to him by his master; but that he had rather have staid out his year. The pauper left his master's house immediately in

(a) Vide *Parsons v. King*, 7 Term Rep. 6, and *Doe v. Dolman*, ib. 618.

consequence of what had passed, and never returned to it. On the next day, the 27th of *March*, a summons having been taken out by the pauper against his master, they both appeared before a justice of the peace for the said county; upon which occasion the pauper applied to the magistrate to direct his master either to receive him into his service for the remainder of the year, or to pay him his whole year's wages: and the magistrate verbally directed half a crown to be deducted from the year's wages and retained by the master. The pauper, on the said 27th of *March*, hired himself as a servant to Mr. *Smith of Broadwas*, and on that day entered upon such service. About a week after the pauper went to his former master Mr. *Jones* for his wages, who paid the full sum of 6*l.* 10*s.* Mr. *Jones* some days afterwards applied for a return of a half crown directed by the magistrate to be deducted, but the same was never returned to Mr. *Jones*. The Sessions, being of opinion that the pauper under the circumstances above stated had gained a settlement in *Lulsley* by hiring and service for a year with *S. Jones*, quashed the order. The question for the opinion of the Court was, Whether under the circumstances above stated the pauper served a year with *S. Jones*, so as to gain a settlement in *Lulsley*?

Puller, in support of the order of Sessions, endeavoured to distinguish this from *Rez v. King's Pyon*, 4 East, 351, and *Rez v. Sudbrook*, 4 East, 356, in the former of which the master upon some dispute had discharged the servant so long as four months before the end of the year; and the magistrate to whom the servant applied for redress gave the master the option either to take her back, or to put an end to the contract upon paying the whole year's wages; and he elected to pay the whole wages, which the servant agreed to accept; but the master withheld some wool which he had agreed to give her if she behaved well. In the case of *Sudbrooke*, it was stated that the servant, about a fortnight before his year expired, being too ill to work, left his master's service upon receiving his whole year's wages, from whence his assent to the dissolution of the contract was inferred; as in the prior case it was from the servant's accepting the wages upon the terms offered by the magistrate to the master. In neither case was there any fraud, which is the distinguishing feature of this case. Here the servant going to seek for another place at the mop was a lawful cause of absence, as was holden in *Rez v. Islip*, 1 Stra. 423, for which the master could not have discharged him, even if he had gone there without leave, and still less with it: and it was settled in the case of *Eastland and West-Horsley*, 1 Stra. 526, that a master cannot prevent his servant gaining a settlement by wrongfully turning him out of his service before the end of the year. Now here the act of the master was wrongful and fraudulent, and the servant all along refused to put an end to the contract, and received his whole year's wages after the expiration of the year.

Peake and Petit, contra, were stopped by the Court.

Lord ELLENBOROUGH, C. J. How can there be said to have been a constant refusal of the servant to put an end to the contract when he actually entered into another service before the time when his first contract would have expired? That is an insuperable difficulty. (1) That he did not receive his wages before the year was out cannot vary the case; for he would have received them at the time, if offered. The case of *King's Pyon* is almost in terms the same as the present. The magistrate in both cases was made a sort of arbitrator between the parties, and both parties acquiesced in putting an end to the contract of master and servant.

The other Judges concurred. And *Le Blanc, J.* added, that if there were any fraud in this case, the magistrate must have been a party to it.

Order of Sessions quashed.

(1) It is on this circumstance that the case turns; for without it the decision would be different. See *The King v. Hardhorn-with-Newton*, 12 East, 51.

Sedgewick v. Allerton.

7 East, 542. June 18, 1806.

The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea, after the time when the defendant would have been bound to plead if no such order had been made.

UPON a rule for setting aside an interlocutory judgment for irregularity, it appeared, that the declaration was delivered on the 16th of *May*, and on the 22d there was a rule to plead. On the 23d, indorsed for the 24th, a summons was taken out for time to plead, and eight days were given, which would expire on the 4th of *June*; but the plaintiff was never served with any order for time to plead, and considering the order as abandoned he signed judgment on the 2d of *June*: after which, and within time if the order had been drawn up and served, the defendant pleaded the statute of limitations.

Park shewed cause against the rule, and contended for the regularity of the judgment, for want of drawing up and serving the order for time to plead. And

The Court were satisfied that the order ought to have been drawn up and served; as it might otherwise open a door to mistakes and perjury as to the terms on which the order was granted. Whereupon

Abbott, contra, objected, that the declaration was delivered so late in the last term, that the defendant was not bound to plead till this term; and therefore did not want the order for time to plead: and this being assented to by the Master,

The Court, on this latter ground, said, that the parties were remitted to their original situation as if there had been no order made for time to plead; and therefore made the

Rule absolute.

Thornton and Others, Assignees of Rangdale, a Bankrupt, v. Hargreaves and Another.

7 East, 544. June 18, 1806.

Where a trader being pressed by a creditor for payment or security, one or other of which he said he would have, gave a bill of sale of certain wools and cloths in a mill, apparently the whole of his stock, and immediately left his business and home and became a bankrupt: this, inasmuch as the act done did not redeem the trader even from any present difficulty, which is the ordinary motive for such an act when really done under the pressure of a threat, is evidence that it was not done under such pressure, but voluntarily, and with a view to prefer the particular creditor in contemplation of bankruptcy; and is therefore void as against the assignees of the bankrupt.

IN trover for certain wools and woollen cloths, tried before *Rooke*, J. at the last *York* assizes, the only question was, whether the defendant had obtained the goods in question by undue preference from the bankrupt in contemplation of bankruptcy. The material witness for this purpose was *Rd. Hargreaves* the book-keeper and near relation of the defendants, called by the plaintiffs; who proved, that when *Rangdale* became a bankrupt he owed the defendants above 200*l.*: that he had before promised them payment, and had not kept his word. That *Rangdale* met the defendants at his (the witness's) house on the 24th of *October* last. *Rangdale* had then two parcels of goods at the defendant's house, the value of which were to be settled afterwards. The defendants told *Rangdale*, that they expected him to have paid according to promise, to which he answered, that he had not the money, but would pay 50*l.* in a week. The defendants said they would have money, or security, or the goods; that

they had a right to stop the goods, and would be paid. *Rangdale* said, that they need not be in a hurry; they had always a sufficient security in their hands for their money. The same witness also deposed that he did not recollect any thing said about *Rangdale's* stopping; but that he was afraid that some of his creditors would be turbulent with him if he could not pay them as they expected; by which the witness supposed that *Rangdale* might mean, in case he suffered the goods to remain in the defendant's hands. The witness then wrote out a bill of parcels of a sale of the goods in question from *Rangdale* to the defendants: (a) which was not signed by *Rangdale*, nor was he asked to sign it; but the witness deposed that he wrote it "by *Rangdale's* consent, order, and appointment, in his room and stead." When *Rangdale* left the witness's house, he said he was going to his workman's house, about two miles from his own house: he did not say how long he should stay, nor whether he should go home that night; and he gave no other reason for going than the settling about delivering two raw cloths to the defendants. He said something about *facing his creditors*: but did not give that as a motive for going away, to the best of the witness's recollection. But that if he should be obliged to start on account of his creditors, he hoped the witness and another person whom he named would bring about an assignment. Afterwards, on the same evening, *Rangdale* desired the witness to say to his uncle, that he thought he should be obliged to stop on account of what he had done for the defendants (*i. e.*) the sale of the goods in question to them. On his cross-examination he said, that the bill of sale was to enable the defendants to ascertain the value. That the bankrupt had previously at times said, that the defendants had always a security in their own hands. That the bankrupt set the prices to the goods, and the witness wrote them down as he fixed them. That the defendants had suffered the bankrupt to take away three pieces of Raw the day before. That he said he had plenty to pay with, and could pay 20s. in the pound. That the witness made the bill of sale that there might be a sale, and the defendants thought it would make it more secure. On this evidence the learned Judge left it to the jury to say whether there were any fraud between the bankrupt and the defendants. That fraud would vitiate any transaction, but that where there was no fraud, creditors had a right to use menaces, or compulsory means, to obtain payment. And he left it to them to decide, whether the defendants had acted honestly and fairly in enforcing this security by bill of sale, or whether the bankrupt had acted voluntarily, and had fraudulently agreed with them to give them a preference. The jury found a verdict for the defendants; which was moved to be set aside, and a rule *nisi* granted in *Easter* term last: against which

Cockell, Serjt. (and *Holroyd* was with him) now shewed cause. This is no more than the common case of a creditor obtaining security for his debt by due diligence and a threat of legal process before the bankruptcy of his debtor, and while he yet had a disposing power over his property. It may be admitted, that the defendants considered *Rangdale's* situation as desperate at the time, which made them the more urgent for payment or security. They had before called upon him for payment, which he had promised, but had failed to perform; and at last, they declared that they *would have* money, or security, or the goods then in their hands, which they insisted on their right to stop, and that they *would be paid*. This amounted to a threat of an arrest by legal process, unless they obtained payment or security by other means. On the other hand, it appears that *Rangdale* did not voluntarily execute the bill of sale which was afterwards given; for he still endeavoured to put the defendants off by saying that they need not be in a hurry, and that they had always a sufficient security in their hands. But fearing, as it appears, that if he were

(a) This was in the common form of a bill of parcels, and intitled "*October 24th, 1805, R. and W. Hargreaves, bought of B. Rangdale;*" and then followed 8 items of goods, amounting altogether to 190*l.* 8*s.* 8*d.*

sued he should bring all his creditors upon him, and be put to great inconvenience, though still insisting upon his solvency, he at last executed the bill of sale of the goods in the mill. This cannot be said to have been a *voluntary* payment made in contemplation of bankruptcy in favour of a particular creditor; the circumstances shew that he made it unwillingly, after having in vain endeavoured to evade and postpone the demand. If the defendants had sued out a writ against him under which the payment had been obtained, there could have been no doubt of its validity; but there was no necessity for that when the end was obtained by the threat of it. The question of fraud was distinctly left to the jury, and negatived by their verdict. And he referred to *Hartshorn v. Slodden*, 2 Bos. & Pull. 582, where Lord *Alvanley*, under somewhat similar circumstances, said, that "if the goods be delivered through the urgency of the demand, or the fear of prosecution, whatever may have been in the contemplation of the bankrupt, this will not vitiate the proceeding."⁽¹⁾ And there too the goods which had been given to the defendant by the trader shortly before his bankruptcy were in part payment of a bond debt not then due; and yet the sale was established.

Park and *Topping*, in support of the rule, said, that *Hartshorn v. Slodden*, and other cases there cited, were cases where the act of bankruptcy did not take place till some days after the respective securities given; whereas here at the time of the bill of sale given there was an inception of the act of bankruptcy; for it did not appear that the bankrupt ever returned to his own home again, and he certainly never shewed himself again in his business: and this sufficiently distinguished the present from the antecedent cases, even if the goods had been obtained upon an actual threat of process pending an incipient act of bankruptcy, then immediately contemplated; which had never yet been decided. But here there was no such direct threat; only a mere demand of security; which would not make the payment by the bankrupt less voluntary when made in contemplation of bankruptcy. [In answer to an observation of *Le Blanc, J.* that there was no evidence of the proportion which the goods conveyed by the bill of sale bore to the general property of the bankrupt; they answered,] that it swept away the whole.

LORD ELLENBOROUGH, C. J. The only difficulty which lies on the plaintiffs in this case is to make out that this was a *voluntary* payment on the part of the bankrupt; for that bankruptcy was contemplated by him when he made the bill of sale all the evidence strongly shews. But taking the conversation reported between the defendants and the bankrupt to be a threat of process if they did not receive payment or security for their demand, I do not see how the execution of such a threat could put the bankrupt in a worse situation than the actual transfer of the goods did: for that left him without any property, and he was immediately obliged to break up his business, and leave his home. This would rather shew that he did not make the transfer by dint of the threat; for he did not redeem himself even from any present difficulty by doing the act; which is the motive for such an act when really done under the pressure of the threat. And if he got nothing by evading the threat, I should rather say that it was a voluntary act and preference on his part as to the particular creditors. Altogether it is a very suspicious case, and fit to be further inquired into and submitted to another jury.

LAWRENCE, J. If the bill of sale swept away, as it is said, the whole of the bankrupt's property, it would be difficult to say that it was not made in contemplation of bankruptcy; because it would be in itself an act of bankruptcy; and if so made in contemplation of bankruptcy, he must have intended to give a preference to the particular creditors.

The other Judges concurring,

Rule absolute on Payment of Costs.

(1) See also *Crosby v. Crouch*, 11 East, 256. *Bayley & al. v. Ballard & al.* 1 Campb. 416.

The King v. The Justices of Shropshire.

7 East, 549. June 19, 1806.

The justices are bound by stat. 9 Geo. 1. c. 7. s. 8, to receive and adjourn an appeal made to the next sessions after an order of removal made, against such order, if no notice have been given to the respondent; though they should be of opinion that the order was executed in sufficient time before the sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents.

AN appeal was lodged at the next Sessions after an order of removal made, and was moved to be adjourned, on the part of the appellants; no notice having been given to the respondents: but the Sessions, being of opinion that there had been sufficient time for the appellants to have given such notice after the order had been executed and before the holding of the sessions, dismissed the appeal. Whereupon a rule was obtained in the last Term, calling upon the defendants to shew cause why a *mandamus* should not issue to them commanding them to receive and enter a continuance on the said appeal to the next general quarter sessions, and there to hear and determine the matter of the said appeal. This rule was enlarged to the present term on the motion of the defendants' counsel. But

Clifford now moved to make the rule absolute; stating the above facts; and suggesting that the defendants, upon advice taken, were satisfied that they had no discretion to dismiss the appeal unheard, on the ground alleged, as had been once ruled in *The King v. The Justices of the North Riding of Yorkshire*, 3 Term Rep. 150; the contrary having been since determined in *The King v. The Justices of Bucks*, 3 East, 342, upon the construction of the stat. 9 Geo. 1. c. 7. s. 8, which expressly directs, that "if it shall appear to the Sessions that reasonable notice was not given, then they shall adjourn the appeal to the next quarter sessions, and then and there finally determine the same."

LORD ELLENBOROUGH, C. J. said, that the opinion delivered in the case of *The King v. The Justices of Buckinghamshire* had been well considered; and the Court were satisfied that the statute was compulsory on the Sessions in these cases to receive and adjourn the appeal.

Per Curiam,

Rule absolute.

Doe, on the Demise of Lord Bradford v. Watkins and Another.

7 East, 551. June 19, 1806.

Under an agreement of demise, dated in *January*, of a dwelling-house and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of 35 years, to commence as to the meadow ground from the 25th of *December* last; as to the pasture from the 25th of *March* next; and as to the housing, mills, and all the rest of the premises, from the 1st of *May*; reserving the first half-year's rent on the day of *Pentecost*, and the other half-year's rent at *Martinmas*; held, that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of *May*, that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of *December*, when the incoming tenant had liberty of entering on the meadow; which was merely auxiliary to the other and principal subject of demise; and consequently, that a notice to quit served on the 28th of *September* (which would have been sufficient with reference even to the 25th of *March*, the day of entry on the pasture ground; the 29th of *September*, being the corresponding half yearly day of holding to the 25th of *March*) to quit at the expiration of the current year of holding, was sufficient. Notice to quit served on one of two tenants on the premises, who held under a joint demise, is evidence that the notice reached the other who lived elsewhere.

THIS was an ejectment for the recovery of messuages and lands, &c. in
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the parish of *Middleton* in the county of *Lancaster*, upon a demise laid the 11th of *June* 1805. The action was tried before *Chambre, J.* at the last assizes for that county; and the case turned upon the sufficiency of the notice to quit. The premises in question, in the possession of the defendants, consisting of messuages or dwelling-houses, out-houses, mills, and other manufacturing buildings, meadow and pasture lands and bleaching grounds, though not much of the latter, together with all watercourses, &c. were holden under a written agreement for a lease, dated the 1st of *January* 1792, for a term of 35 years, to commence as to the meadow ground from the 25th of *December* then last past; and as to the pasture ground (except the field called the *Bull Hill* for haining in) from the 25th of *March* then next; and as to the said field called the *Bull Hill*, and the housing, mills, out-housing, and other buildings, and all the residue of the said premises, from the 1st of *May* next; at the yearly rent of 250*l.* payable on the day of *Pentecost*, and on the feast day of *St. Martin*, the *Bishop* in winter, the first payment thereof to begin and be made on the feast day of *Pentecost* next. It was further agreed, that the original lessee from whom the defendants claimed, should, within ten years after the commencement of the term, lay out 4000*l.* in buildings and improvements on the demised premises. And the lessee was at liberty to get coals under the premises, paying a certain proportional rent for the same to the landlord. The notice to quit, which was served on the defendants on the 28th of *September* 1804, was for the defendants to quit at the expiration of the then current year of their holding. It also appeared, that the defendants were partners in the bleaching trade which they carried on upon the premises. Objection was taken to the notice to quit, that it was not half a year before the 25th of *December*, nor, (according to the number of days) before the 25th of *March*; and that the tenancy being entire, the notice to quit being bad as to part of the demised premises was bad as to all. But the learned Judge, on the authority of the cases after-mentioned, thought it sufficient; considering that the effective commencement of the tenancy was on the 1st of *May*, when the entry was to be made on the houses and the rest of the premises, besides the meadow and pasture ground, which the tenant had liberty to enter upon before. In *Easter* term last a rule nisi was obtained for setting aside the verdict and having a new trial, upon two grounds, 1st, that the substantial time of entry, (which according to *Doe d. Strickland v. Spence*, 6 East, 120, is alone to be regarded) was either the 25th of *December*, from whence the first holding as to the meadow ground was to commence; or from *Martinmas* preceding; the rent being reserved at *Pentecost* and *Martinmas*, and the first half year being payable at *Pentecost* next after the date of the agreement; with neither of which periods (*Christmas* or *Martinmas*) did the notice to quit accord. 2dly, That notice to quit was only served on the defendant *Watkins*, who resided on the premises; there being no proof that the other defendant, who was joint tenant with and partner of *Watkins*, and resided at *Liverpool*, had been served with any such notice. But on the authority of *Jones d. Griffiths v. Marsh*, 4 Term Rep. 464, it having been left to the jury to say whether the notice served on the one upon the premises had not reached the other defendant, this objection was afterwards abandoned.

Cockell, Serjt., *Topping* and *Yates* were now to have shewn cause; but after the former had stated the facts, and the rule laid down in *Doe v. Spence*, and contended that the substantial time of entry was either on the 25th of *March* when the incoming tenant entered upon the pasture ground, or on the 1st of *May* when he took possession of the house and manufacturing buildings, &c., which were the principal objects of the demise; the Court desired to hear the other side; saying, that the *onus* was thrown upon them of shewing that the substantial commencement of the tenancy was either at *Martinmas* or *Christmas*.

Park, Wood, and Scarlett, in support of the rule, said, that in the case of *Doe v. Spence*, where there were different times of entry upon different parts of the premises, the Court looked to the rent days as explanatory of the true commencement of the term; because it happened there that the time of entry on the house accorded with the next rent day: but here, if the substantial time of entry be taken only from the 1st of *May*, the tenant whose first half year's rent was made payable at *Pentecost* would have to pay it yearly six months beforehand, without the enjoyment of that which it was said was the principal subject of the demise, and in respect of which enjoyment the rent is reserved. And the same objection applies, though in a less degree, to the 25th of *March*, as the commencement of the tenancy, even supposing that a notice to quit any time before the 29th of *September* the corresponding half year's day, without going further back than the 25th of *September*, would suffice for half a year's notice to quit on the 25th of *March*; (which all the Court were clearly satisfied that it would.) [*Le Blanc*, J. having observed, that in truth there was little or no enjoyment of the pasture or meadow between the 25th of *December* and the 1st of *May*: they answered] that they might be used as bleaching grounds during that period; which distinguished this case in another respect from *Doe v. Spence*, where the demise was merely for agricultural purposes. Here the occupation of the meadow ground on the 25th of *December* was as beneficial for the tenant for manufacturing purposes as that of the house on the 1st of *May*; therefore the notice to quit should have been half a year before the first entry, which would necessarily have been sufficient for the subsequent times of entry on the several other parts of the premises; though as the tenancy was entire no ejectment could have been brought till after the 1st of *May*, the last period of quitting. [*Le Blanc*, J. said, that there was no evidence that the meadow was to be used for bleaching.] They then noticed another distinction between this and the cases of *Doe v. Snowdon*, 2 Blac. Rep. 1224, and *Doe v. Spence*; that here there was an express stipulation in the agreement that the term of 35 years should "commence as to the meadow ground from the 25th of *December*, &c. which precluded all argument by implication that it was to commence at any other time as to that part of the premises; and so of the rest: whereas in the other cases, the only express stipulation was to the times of entry on the several parcels, which left it open to implication and construction as to the true commencement of the term demised.

LORD ELLENBOROUGH, C. J. The rule was laid down by the Court in *Doe v. Spence*, that in these cases where the incoming tenant enters upon different parts of the demised premises at different times, the giving half a year's notice to quit before the substantial time of entry is sufficient: and this is a convenient rule to adhere to. What then was the substantial time of entry in this case? The object of the demise was, as stated, for the purpose of the tenant's establishing and carrying on a certain manufactory, of which the houses, buildings, and watercourses constituted the principal part; of these, as well as of the coal-mines, the tenant was to take possession on the 1st of *May*; and every thing else in the demise was merely auxiliary to the first mentioned, which were the principal objects of it. The possession of the meadow on the 25th of *December* might be convenient to the incoming tenant to prepare it, if it should be wanted, for the purpose of using it afterwards as a bleaching ground; for there could be no beneficial enjoyment of it as meadow at that season. It is therefore to be considered as a mere liberty of entering upon a part for the purpose of preparing it for the more convenient enjoyment of the rest and principal object of the demise, the houses, mills, and watercourses. No inconvenience can arise from such a construction; and it obviates the inconvenience of giving separate notices to quit the different parts of the premises, which were clearly meant to be demised as one entire thing. Then if that, which was a by-gone day at the time when the

agreement bears date, were not the substantial day of entry of the tenant, the notice to quit was in time for either of the other days of entry; for the 1st of *May*, which was the substantial time of entry on the principal subject of the demise; or even for the 25th of *March*, if that were required.

GROSE, J. It is right to adhere to the rule laid down in *Doe v. Spence*, which is founded in good sense and convenience, that the half-year's notice to quit shall be given with reference to the substantial time of entry of the tenant; and when that is must depend on what is the substantial part of the thing demised whereon the tenant enters. Now here the demised premises consisted of meadow, pasture, and manufacturing buildings, &c. on which the tenant was to enter at different times; but the substantial part of the demise was the house and manufacturing buildings, &c. on which the tenant was to enter on the 1st of *May*: that therefore was the substantial day of entry. In some cases, indeed, it has been said, that the material time to look to is the day of payment of the rent: with those cases I do not meddle: it is sufficient to say, that they do not apply to the present. And there is the less reason for taking that as the criterion in this case; for the day of *Pentecost*, on which the first half-year's rent was made payable, may fall upwards of a month sooner or later; and it might so happen that the tenant, if his tenancy were determinable at that period, might be deprived of so much enjoyment of the premises demised, though he paid rent for the whole year.

LAWRENCE, J. The question is, if there have been a reasonable notice to quit given in this case? It was decided in *Doe v. Spence* that half a year's notice to quit with reference to the original time of entry on the substantial part of the premises demised was sufficient, though other parts, the previous occupation of which was only auxiliary to the principal subject of demise, were to be quitted at less than half a year's notice, with reference to the original times of entry on such auxiliary parts. Now here the substantial parts of the demise were the house and manufacturing buildings, &c. which were entered on the 1st of *May*; and the other parts of the premises, which the tenant had liberty to enter before, were only auxiliary to these.

LE BLANC, J. The substantial time of entry is not necessarily to be collected from the rent days, though it happened in the case of *Doe v. Spence* that the tenant entered on the substantial part of the premises on the day from which the rent was reckoned. But here the rent is reserved on a day on which no part of the premises were entered by the tenant. In this case the principal parts of the subject demised were the house and buildings which were demised for the purpose of carrying on a manufacture there; and these were entered on the 1st of *May*: and therefore the giving six months notice to quit with relation to that which was the substantial time of entry is sufficient, without reference to the times of entry on the other parts which were merely auxiliary to those. There was no evidence that the meadow which was entered on the 25th of *December* was to be used as a bleaching ground; and it is certain that it could not be so used in the first instance by the incoming tenant, before he had entered upon the house and other buildings where the manufacture was to be carried on.

Rule discharged.(1)

(1) Vide *Doe d. Heapy v. Howard*, 11 East, 498, and the editor's note to *Denn v. Bruns v. Rawlins*, 10 East, 263, where the cases relating to notice to quit are collected and arranged.

Hinde v. Whitehouse and Galan.

7 East, 558. June 20, 1806.

Sugars, which were in the King's warehouse under the locks of the King and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th of September; when samples of half a pound weight from each hoghead, drawn after the sugars had been weighed and the duties ascertained at the King's beam, were produced to the bidders assembled; and the auctioneer, (having then before him the printed catalogue of sale, containing the lots, marks, and number of hhd., and the gross weights of the sugars: and also another written paper containing the conditions of sale, which latter he read to the bidders, as the conditions on which the sugars mentioned in the catalogue were to be sold; but the two papers were neither externally annexed nor contained any internal reference to each other,) wrote down on the catalogue the name of the highest bidder, and the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller: and after the biddings closed, the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase to make up the quantity marked as weighed at the King's beam: and a fire having consumed the sugars on the 22d of September, before the duties could be paid, and without the default of the seller: Held,

- 1st, That at common law there was a sale to change the property at the time and place of auction; though the goods could not be delivered till the duties were paid, which was known at the time; such being the manifest intent of the contracting parties: and consequently, that the loss must fall upon the buyer.
- 2dly, That assuming a sale of goods by auction to be within the 17th section of the statute of frauds 29 Car. 2. c. 3, (which whether it were or not was not now necessary to be decided,) and therefore requiring to be evidenced by a memorandum in writing of the bargain signed by the party to be charged, or his authorized agent, except where the buyer shall receive part of the goods sold; yet here the delivery to and acceptance of the samples by the buyer; which delivery was made as part of the thing purchased, and upon which the duties were paid; at any rate, took the case out of the statute.
- 3dly, It seems, that taking sales of goods by auction to be within the 17th section, the auctioneer or broker, who is a middle man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature.

IN *assumpsit* the plaintiff declared, that on the 20th of September 1805, at *Liverpool*, he was lawfully possessed of 300 hhd. of sugar, then lying in a certain warehouse there, and caused them to be put up for sale by public auction upon the following conditions; "the highest bidder to be the purchaser, and in case of dispute, the lot to be put up again. The sugars to be taken with all faults and defects as they now are, at the King's weights and tares, with the allowance of draft, or re-weighed giving up the draught. To be at the purchaser's risk from the time of sale; and to be positively removed within two months, or rent to be paid for any longer time they may remain. Payment to be made on delivery of invoices by approved bills on *London* to the satisfaction of the seller not exceeding three months date. Not to advance less than 3d. per cwt. at each bidding." Of which conditions the defendants had notice. That the defendants were the highest bidders at such sale for two lots of the said sugars, consisting of 27 hhd., and became purchasers of the same at the price of 74s. per cwt. at the King's weights and tares, with the allowance of draft. That the price of the 27 hhd. amounted to 1265l. 11s. 3d. That the plaintiff, on the 23d of September, delivered to the defendants an invoice of the 27 hhd., whereupon they became liable to pay him the 1265l. 11s. 3d. But that the defendants did not make payment, &c. There were other counts laying the contract more generally. To all which the defendants pleaded the general issue. The cause was tried before *Rooke, J.* at the last assizes at *Lancaster*; and the point in dispute was, whether the plaintiff or defendants should bear the loss of the sugars in question, which were knocked down to the defendants, by the auctioneer, at the sale on the 20th of September, and which were burned on the 22d of September, by an accidental fire in one of the king's warehouses at *Liverpool*, where they were

deposited. It was proved that the sugars, after being landed at *Liverpool* on the plaintiff's account, were deposited in one of the king's warehouses there, under the locks of the king and of the plaintiff, from whence they could not be removed until the duties were paid. Previous to the sale, samples were taken of the sugars, about half a pound weight out of each hogshead, according to custom. The printed catalogues of goods for sale was made out in this form and distributed: "To be sold by auction, at *Waterhouse* and *Sill's* office, on *Friday* the 20th of *September* 1805, at 1 o'clock, 300 hhds. *Jamaica* sugar, just landed. For particulars apply to *Thomas Hinde*, merchant, or *Waterhouse* and *Sill*, brokers.

Lot.	Mark.	Hdds.	Gross Wt.		
1.	I. A.	10	119	3	9
2.		10	121	0	7
&c.					
23.	R. H.	12	169	3	13
&c.					
27.		15	207	2	13
&c.					

At the time of the sale the auctioneer's printed catalogue lay on the desk before him, and he wrote down in the same line with the lot purchased the name of the highest bidder, or purchaser, and the price bid per cwt. thus:

Lot.	Mark.	Hdds.	Gross Wt.			
23	R. H.	12	169	3	13	74s. } <i>Whitehouse</i> and <i>Galan.</i>
27		15	207	2	13	74s. } <i>Whitehouse</i> and <i>Galan.</i>

The auction was holden at the time and place appointed, and was conducted by Mr. *Sill*, as auctioneer. There was no other sale on the same day. The samples were exhibited in the sale room, and the lots in question were knocked down to the defendants as the highest bidders. At the commencement of the sale, the auctioneer, having the catalogue, and also a written paper containing the conditions of sale, in his left hand, at the same time, read the latter paper, as the conditions on which the sale of the sugars mentioned in the catalogue was to proceed, to the company assembled, (including one of the defendants) which paper was entitled, "conditions of sugar sale, *September* 20th, 1805;" and which paper he afterwards deposited on his desk under the catalogue, on which catalogue he wrote his minutes of the bidders' names and prices; but the two papers were not fastened together in any manner. He also made the following declaration by parol to the bidders, which, after the sale, his clerk wrote down upon the paper of conditions of sale. "N. B. These sugars, gentlemen, have been drawn in the warehouse within the last two days: as such, no allowance whatever will be made, except where an evident error is manifest. *The duties are not yet paid, but we intend paying them to-morrow morning.*" It is customary at such sales to give an option to the purchaser to take the sugars sold according to the weights taken at the king's beam, which were marked in the catalogue, or to have them reweighed: to this option one of the conditions of sale points. But it is the constant practice for the purchaser to declare his option before he leaves the sale room, if he wish to have them reweighed, in order that the seller may know how to make out the invoices; otherwise, if he then declare no option, the invoices are made out according to the weight at the king's beam. In the present case the defendants declared no option. The sugars are always weighed on landing, before they are put into the warehouse; on which weighing the duties are ascertained; and after that the samples are drawn. The samples are always delivered to the purchaser as a part of his purchase to make up the quantity; and were accordingly delivered to the defendants on the same day after the sale. The invoices were made out on *Saturday* the 21st of *Septem-*

ber, but were not delivered to the defendants till *Monday* the 23d, after the fire happened. The duties are always included in the price of the sugars, and such duties are always paid by the vendor, and are so required to be by the stat. 41 Geo. 3. c. 44, (a) and till paid the sugars cannot be removed from the king's warehouse. The sale was over by a quarter past 4 o'clock on *Friday* the 20th, but from the hours of office and the distance there was not time after the sale to get the entries made, and to pay the duties. *Saturday* and *Sunday* were holidays at the *Custom-house*; and *Monday* the 23d was kept as such, being the king's coronation day. The circumstance of *Saturday* being a holiday was not recollected at the time of the sale, when the auctioneer declared that the duties should be paid on the morrow; but the circumstance was mentioned by the defendant, *Whitehouse*, to a clerk of *Waterhouse* and *Sill*. On this point the jury found that there was no neglect in the vendor as to the non-payment of the duties before the fire happened, which was in the course of *Sunday* the 22d. The auctioneer said, that it often happened that purchasers sold their sugars again before the duties were paid, and before they were delivered out of the warehouse; and that after the fire the defendants gave him instructions to take care of the goods, and save what he could, *without prejudice* to the rights of the parties.

Upon this proof it was objected, that there was no legal evidence sufficient to fix the defendants with the purchase of these goods within the statute of frauds; there being no memorandum in writing of the contract signed by the parties, or their authorized agent. That the auctioneer was no authorized agent of the vendees; but that supposing he were so, the whole contract must appear upon the paper signed by him with the names of the defendants, whereas the conditions of sale, which formed an essential part of the contract, were not so signed, nor in any ways connected, except by parol testimony, which was inoperative by the statute, with the catalogues signed. And that the delivery of the samples was *diverso intuitu*, and not as part of the goods contracted for. The learned judge over-ruled the objection, but reserved the point; and a verdict was found for the plaintiff for 1110*l*. Whereupon a rule *nisi* was obtained in *Easter* term last, for setting aside the verdict, and granting a new trial, upon the same grounds of objection; which rule was, in this term, opposed by *Park*, *Tapping*, and *Scarlett*, who shewed cause, and supported by Sir *V. Gibbs*, *Marshall*, Serjt., *Holroyd*, and *Littledale*. The case was much argued, upon the circumstances of it; but it is sufficient to state the general points.

On the part of the plaintiff it was contended, 1st, that sales by auction are not within the statute of frauds 29 Car. 2. c. 3. s. 17, at all, because from the publicity of such transactions there is no danger of perjury in the fabrication of pretended contracts, which it was the object of the statute to guard against in private transactions, such alone being open to that danger. For which they cited the opinion thrown out in *Simon v. Metivier* or *Motivos*, 1 Blac. Rep. 601, 2, and 3 Burr. 1922. 2dly, That if such sales were within the statute, yet that the requisites of it were complied with here, either, 1st, by the written memorandum of the contract of sale, on which was subscribed the name of the purchaser, made at the time by the auctioneer, who was to be considered as the agent of both parties, according to the case cited. And they contended that the conditions of sale being on a separate piece of paper made no difference; being exhibited together with the paper so subscribed at the time of the sale, as forming part of the terms on which the contract of sale was to be made: and that it was not necessary for the two papers to be attached to each other by a pin or other fastening; for the same objection might still be made that whether so attached or not at the time must be proved by parol evidence. But that if the objection had any weight, it would go the length of proving

that no parol evidence could be given to shew that the printed conditions exhibited at the time of the sale were part of the terms of sale, since they were not annexed to the written contract subscribed with the purchaser's name by the auctioneer. Or, 2dly, that at any rate, the case was taken out of the statute by a *part delivery* of the goods sold; which the delivery of the samples must be taken to be; being accounted for as part of the quantity sold, and included as such in the weight at the king's beam, by which the duties were ascertained.

On the part of the defendants it was urged, 1st, that the words of the 17th section of the statute comprehended all contracts for the sale of goods for 10l. or upwards, without any distinction between sales by auction and other sales: though if the positive words of the statute could be dispensed with by general reasoning, the frequent disputes which arose at public sales, concerning the terms of the bidding, shewed that they were as much within the mischief meant to be guarded against as any other sales: the condition might be varied during the sale, or a new condition added; or one set of conditions might be substituted for another afterwards. 2dly, Supposing such sales to be within the statute, it was contrary to the plain fact to consider the auctioneer, who was appointed and paid by the seller alone, and over whom the purchaser had no controul, as the agent of the latter. That the memorandum made by the auctioneer of the purchaser's name and the sum bid was merely for the private information of his employer, and which the buyer had no right to inspect. And they denied the authority of *Simon v. Metivier* on both points; which, they said, had been broken in upon, with respect to sales of *land* by auction, in *Walker v. Constable*, 1 Bos. & Pull. 306, in *C. B.*, *Stansfeld v. Johnson*, 1 Esp. N. P. Cas. 101, before Ld. C. J. *Eryc*, and by the Master of the Rolls in *Buckmaster v. Harrop*; (a) and though sales of land depend upon another section of the statute; yet in this respect there is no distinction in reason between the two. (b) 3dly, they argued, that supposing the auctioneer to be the agent of both parties, yet here was no sufficient memorandum in writing of the bargain; because there was no connection either external, or internal, by words of reference or by the context, between the paper signed by the auctioneer and the other paper containing the conditions of sale, and which were part of the bargain of sale: and it was the same as if the auctioneer had verbally declared those conditions. That the statute did not go to exclude parol evidence of the real terms of the contract, for otherwise the check intended by the statute would be nugatory; but only to nullify the contract so made, unless the terms were committed to writing and signed, &c. That neither, 4thly, did the delivery of the samples take the case out of the statute; because the samples were delivered *diverso intuitu*, to enable the purchaser to compare the bulk of the goods with them, to see that they corresponded, or to sell by them again: and not as a part of the bulk itself. And that it made no more difference that the samples were included in the weight at the king's beam, than if a quantity of cloth were first measured and then sold, and a small strip were cut off by way of sample to identify the bulk, or to shew to customers. Besides which, the duties were to be paid by the seller; and whether he were guilty of laches or not in not having paid them before the accident, yet the bulk could not have been delivered to the purchaser out of the king's warehouse till the duties were paid; but an absolute sale to change the property implies a present power of delivery at the place where the goods are.

The Court said, they would deliver their opinion on the next day; which was now done by

(a) 7 Ves. jun. 345. But vid. what was said by Lord Eldon, C. in *Coles v. Trecothick*, 9 Ves. jun. 249.

(b) By the 4th sect. to affect lands, the note, &c. must be signed by an agent thereto lawfully authorized *by writing*, &c. which words "*by writing*," are omitted in the 17th sect. touching the sale of goods.

Lord ELLENBOROUGH, C. J. This was the case of a sale by auction of sugars in the king's warehouse, and which were afterwards burnt whilst they remained there under the king's lock, and deposited there for the receiving of the king's duties. And the question is, Whether such a sale of those goods has taken place as is sufficient *to change the property*, and to make them the goods of the purchasers? The goods were put up to sale on the 20th of *September*, in pursuance of a catalogue of sale which had been previously distributed for that purpose, containing the lots, marks, number of hogs-heads, and gross weights of the sugars, and referring for further particulars to the brokers; and they were sold on that day, according to certain conditions of sale, which the auctioneer read to the bidders assembled, as the conditions on which the sale of the sugars enumerated in the catalogue was to be made; (his Lordship here described the catalogue and read the conditions of sale, as before stated;) and the auctioneer also informed them that the duties were not then paid, but would be paid by the sellers on the morrow. It is admitted, however, that no laches is imputable to the sellers for the non-payment of the duties between the time of sale and the fire, which happened on the 22d of *September*. Two questions have been made on the 17th section of the statute of frauds, upon which questions depends whether what has passed between the parties as to those goods constituted a valid contract of sale in respect to them. The first question argued upon the latter words of that section is this: Is the writing which has been put upon the catalogue of sale by the auctioneer "*a note or memorandum in writing of the bargain made and signed by the parties to be charged by the contract, or their agents thereunto lawfully authorized,*" within the meaning of the statute? The second question is, whether this be a case in which the buyer can be said to have "*accepted part of the goods sold, and actually received the same?*" But independently of and besides these questions, it has been said, that sales by auction are not within the statute; and the case of *Simon v. Motivos*, reported in 3 Burr. 1921, and 1 Blac. Rep. 599, has been relied on. The report in *Burrow* does not distinctly mention this latter point. But in the report of Sir W. Blackstone, Lord Mansfield, speaking of sales by auction, says, "The solemnity of that kind of sale precludes all perjury as to the fact itself of sale." He then mentions the case of a sale of sugars by auction, which were "afterwards consumed by fire in the auction warehouse, and where the loss fell upon the buyer." He afterwards adds, "according to the inclination of my present opinion auctions in general are not within the statute." And Mr. Justice Wilmut says, that he "inclined to think that sales by auction, openly transacted before 500 people, are not within the statute." With all deference to these opinions I do not at present feel any sufficient reason for dispensing with the express requisition of a memorandum in writing in a statute applying to all sales of goods above the value of 10*l.*, without exception, merely because the quantum of parol evidence in the case of an auction is likely to render the danger of perjury less considerable. That argument in a degree applies to all sales in market overt: and if we once get loose from the positive words of the statute, it will become a question only of the quantum and degree of danger of perjury in each particular instance: which opens a door to an indefiniteness of construction founded on all the varying circumstances of the time and frequency of persons attending the place of sale, and the like; which would be destructive of all certainty of practice, and render the rule of the statute perhaps more mischievous than beneficial to the trading world who are to be governed by it. I am not therefore prepared to say, that sales by auction are not meant to be comprehended within the statute.⁽¹⁾ Nor would I be understood as giving any conclusive opinion to the contrary:

(1) Vide note (2) to *Walker v. Constable*, 1 Bos. & Pull. 307. (Day's edit.)
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neither is it necessary that I should upon the present occasion. The first question on the letter of the statute is, is this a memorandum of the bargain made by an agent of both parties? In respect to sales of goods, it has been uniformly so holden ever since the case of *Simon v. Motinos*; and it would be dangerous to break in upon a rule which affects all sales made by brokers acting between the parties buying and selling, and where the memorandum in the broker's book, and the *bought and sold notes* transcribed therefrom and delivered to the buyers and sellers respectively, have been holden a sufficient compliance with the statute to render the contract of sale binding on each. All the great transactions of sale in this great city are so conducted, and stand on this foundation of legality only: and it is too late, I conceive, to draw it into question.(1) Supposing the auctioneer or broker for sale to be the agent of both parties, the question then is, has he made a memorandum of the bargain in this case? and it appears to me, that he has not. The minute made on the catalogue of sale, which is *not annexed to the conditions of sale*, nor has any *internal reference thereto* by context or the like, is a mere memorandum of the name of a person, whom perhaps we may *intend to be the purchaser*, and of the quantity and price of the goods, which we may perhaps on the foot of such memorandum also *intend to have been sold to the person so named in the catalogue*. But in treating it as such memorandum throughout, we must intend also (contrary to the fact) that the goods were sold for ready money, and unattended by the circumstances specified in the conditions of sale. And the conditions of sale, though as unsigned they cannot be evidence of the bargain itself, are yet capable of being given in evidence; and accordingly have been so, as a part of the transaction between the parties, and in order to shew that it was on those conditions that the goods were sold. I am of opinion therefore that the mere writing on the catalogue, not being by any reference incorporated with the conditions of sale, is not a memorandum of a bargain under those conditions of sale.(2)

As to the next question on the statute; inasmuch as the half pound sample of sugar out of each hogshead in this case is, by the terms and conditions of sale, so far treated as a part of the entire bulk to be delivered, that it is considered in the original weighing as constituting a *part of the bulk actually weighed out to the buyer*; and to be allowed for specifically, if he should choose to have the commodity reweighed; I cannot but consider it as a *part of the goods sold under the terms of the sale, accepted and actually received as such by the buyer*. And although it be delivered partly *alio intuitu*, namely, as a sample of quality, it does not therefore prevent its operating to another consistent intent also in pursuance of the purposes of the parties as expressed in the conditions of sale, namely, as a *part delivery of the thing itself*, as soon as in virtue of the bargain the buyer should be entitled to retain, and should retain it accordingly.

As to the last point made in argument, viz. that there has been no effectual sale in this case made, because the commodity was incapable of delivery till the king's duties were paid, and which were to be paid by the seller; I think that the sale, within the meaning of the parties to the conditions, was com-

(1) Vide *Rucker v. Cammeyer*, 1 Esp. 105. Sugden's Vend. 59, 60.

(2) But where a bill of parcels, in which the vendor's name was printed, was delivered to the vendee, at the time of an order for the future delivery of goods, and the vendor afterwards wrote a letter to the vendee referring to the order; it was held that the bill of parcels connected with the letter amounted to a sufficient memorandum of the contract within the statute of frauds. *Seunderson v. Jackson & al.* 2 Bos. & Pull. 238. So where goods were sold by auction to an agent, the auctioneer wrote the initials of the agent's name, together with the prices, opposite the lots purchased by him, in the printed catalogue, and the principal afterwards, in a letter to the agent, recognized the purchase; it was held that the entry in the catalogue coupled with the letter constituted a sufficient memorandum to satisfy the statute. *Phillimore & al. v. Barry & al.* 1 Campb. 513.

plete, so as to cast the subsequent risk of loss upon the buyer. The words, "time of sale," and "highest bidder to be the purchaser," all evidently relate to the transaction of selling at the time and place of auction; which was considered between them as effectual for the purpose of transferring the property and the consequent risk of loss from the buyer to the seller, notwithstanding the intermediate right of custody or lien upon the goods in the crown until the duty should be paid. Besides, after earnest given, the vendor cannot sell the goods to another without a default in the vendee: and therefore if the vendee do not come and pay for and take away the goods, the vendor ought to go and request him; and then if he do not come and pay for and take away the goods in a convenient time, *the agreement is dissolved*, and the vendor is at liberty to sell them to any other person. Per *Holt, C. J.* in *Langford v. Administratrix of Tiler*, Salk. 113. So in *Noy's Maxims*, 88, it is said, "If I sell my horse for money, I may keep him until I am paid; but I cannot have an action of debt until he be delivered: yet the *property* of the horse is *by the bargain* in the bargainor or buyer. But if he do presently tender me my money, and I do refuse it, he may take the horse, or have an action of detainment. And if the horse die in my stable between the bargain and delivery, I may have an action of debt for my money, because *by the bargain the property was in the buyer*." On this latter ground, therefore, I do not think that the sale is incomplete. And as the statute has been satisfied by a part delivery of the goods sold, accepted by the buyer, I think the contract of sale valid as far as respects the statute also, and that the rule for a new trial should be discharged.

Some of the Judges on the bench conceiving that the Lord Chief Justice had questioned generally the authority of the case of *Simon v. Metivier*, desired to have it understood that they concurred in the judgment delivered in this case, on the ground that a part delivery of the thing bought (which they considered the delivery to and acceptance of the samples by the buyer to be in this case) took the case out of the statute; leaving the authority of that case to stand as it did before on its own ground, untouched and unsanctioned by the present decision. But the Lord Chief Justice declared, that the only part of that case which he meant to question, though it was unnecessary at present to decide upon it, was the opinion thrown out that auctions were not within the statute, of which he should reserve his approbation for future consideration. But as to the other point there decided, that supposing sales by auctioneers or brokers to be within the 17th section of the statute, the auctioneer or broker must be taken to be the agent of both parties, the practice had become so settled since the decision of that case, that it would be dangerous to shake it, and it was not his intention to question it. (1)

Rule discharged.

The King v. The Commissary of the Consistorial and Episcopal Court of the Bishop of Winchester in and for the Parts of Surry.

7 East, 573. June 21, 1806.

Where there is no regular presiding sworn officer at an election (*a. g.* of churchwarden, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided) the control of the election devolves at common law upon the electors themselves; but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the com-

(1) ["In the case of sales by auction, it seems to be now settled, that the auctioneer is an agent lawfully authorized by the buyer to sign a contract for him; though it is otherwise where the auctioneer himself brings the action." 2 Steph. N. P. 1994.—W.]

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whereupon the former was declared duly elected; and afterwards presented himself to the commissary to be sworn into the office, which the commissary refused to do, alleging that a caveat had been entered against him by Mr. *Martyr*. That not more than two other persons claimed to vote at the election, who were prevented by the closing of the poll at four o'clock on the *Tuesday*. The affidavits in answer to the rule stated, that Mr. *Martyr* was in *London* at the time of the election, and did not return to *Guildford* till some days afterwards. That he never authorized any person to consent to closing the poll at four o'clock on the *Tuesday*, and that the same was done without his privity or consent. That to the best of the deponents' knowledge and belief it has not been usual to close the poll on such elections until all the persons having a right to vote have voted, without the express consent of the candidates; and that such consent was given in 1796, in the election, when Mr. *Martyr* was the successful candidate. That when the poll was closed on the present occasion there remained 43 persons entitled to vote, who had not given their votes, several of whom would have voted for Mr. *Martyr*, if not prevented by the closing of the poll at that time; and in particular, five voters deposed that they went to the church about four o'clock on the *Tuesday* for that purpose, but were told they were too late; and a sixth deposed that he did not know of the resolution for closing the poll then, and that it was his intention to have voted for Mr. *Martyr*, if his vote would have served his election: and others deposed, that they had protested against the resolution for closing the poll on the *Tuesday*, but were over-ruled by a majority of the vestry present.

Best, Serjt., *Garrow*, and *Peake* shewed cause against the rule, and contended that no resolution of the vestry to close the poll at any particular time was legal; at least, not without sufficient previous notice given to all the electors of such a resolution being intended to be made; but that the poll must be kept open as long, at least, as the voters were continuing to come in to vote, and until such an interval elapsed without any voter coming in as made it reasonable to conclude that no more intended to vote. That it was plain that that period had not arrived, as the poll was closed while the voters were still coming in to vote, and while above forty voters remained unpollled. And they also denied that four o'clock the second day was a reasonable time for closing the poll, as the right of voting was not confined to residents in the parish; and the notice given the day before might not be in time to reach the non-residents, even if it were sufficiently notorious within the parish; which they denied that it was.

Sir *V. Gibbs*, contra, relied upon the custom stated in the affidavits, for the majority of the vestry to resolve on the first day at what hour on the second day the poll should be closed, and four o'clock appeared to be the latest hour for that purpose; which he contended was a reasonable time for 180 voters to poll, and sufficient, unless any of them kept back for the purpose of serving a particular candidate who wished for delay. He observed, that there appeared no right in the rector's churchwarden to preside at the election, and therefore the right of adjournment and of regulating the manner and time of taking the poll devolved by common law, according to *Stoughton v. Reynolds*, 2 Str. 1045, upon the whole body of electors, to be exercised, as in other cases, by the majority assembled. And notice of the intention to come to such a resolution on the first day was rendered unnecessary by the custom. At any rate, sufficient colour of an election was shewn to warrant the issuing of the *mandamus* to try the validity of it.

LORD ELLENBOROUGH, C. J. The custom stated is a sufficient foundation for the Court to grant the how the rector's church-
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I cannot make out upon these affidavits
and presiding officer: he is not sworn.
control of the electors themselves;
it at a certain period, that would

govern: but without any custom there must be some limit, if the limit were assigned by a competent authority, and were in itself reasonable. Now putting out of the question the resolution of the vestry on the first day to determine the election at four o'clock in the evening of the second day, it still appears that for 200 years past there has been no instance of an election of churchwarden continuing beyond four o'clock on the second day. I see nothing unreasonable in this limit; and at any rate, it is sufficient to warrant us in letting the *mandamus* go.

GROSE, J. declared himself of the same opinion; relying on the custom stated, which appeared to allow reasonable time for the voters to come in. And he observed, that this was not like an election of members to serve in parliament, which might happen at any period; but here the election commenced annually on a certain day, *Easter Monday*, which was known to all the voters, and therefore they were less open to be surprised.

LAWRENCE, J. It is true, that the electors cannot narrow the time which the common law or custom would allow for making the election; yet there being no instance, as appears by the affidavits, of a poll for the election of churchwarden in this parish continuing open beyond four o'clock on the second day, it is evidence of its being part of the custom that the votes must be given within that time: and here too notice fit and reasonable in itself was given the day before at the vestry that the poll would be then closed. The only doubt which I feel is, whether that notice were sufficiently public.

LE BLANC, J. If there had been no custom, there would have been a difficulty in the case; but if there be a custom to conclude the poll at a certain time, that being a reasonable time, the voters must tender their votes within it: and this is fit to be tried.

It was then agreed that the validity of the election should be tried in an issue.

The King v. Hopkins and Wife.

7 East, 579. June 21, 1806.

The court will grant a *habeas corpus* to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken at one time by fraud, and afterwards by force: and this without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the King in Chancery.

GARROW moved yesterday, on behalf of the mother of an infant bastard child, for a writ of *habeas corpus* directed to the defendants, who had gotten possession of the child, to bring it before the Court, in order that it might be restored to her. The affidavits, which were very long, stated minutely all the circumstances of the birth of the child, and the subsequent events attending the tracing of it into the possession of the defendants; from whence it appeared, that the child was born, and soon after baptised, in *November 1803*: that in *August 1805*, the defendants obtained possession of it by stratagem and pretence; but soon after returned it to the mother; from whom it was again taken by force by Mrs. Hopkins and two soldiers in *January 1806*.

Lord ELLENBOROUGH, C. J. had some doubt upon the opening of the case, whether the Court could interfere on behalf of the mother of an illegitimate child, who had no legal right to the person of the child; and the question of guardianship belonging to another forum, with which this Court could not interfere; and the child not being of an age to complain for itself of any illegal restraint on its person. He therefore desired the matter to be mentioned again on this day, when the Court would have had an opportunity of looking into the case of Dr. Moseley's child. (a)

(a) Vid. 5 East, 224, n. and *Rex v. Soper*, 5 Term Rep. 278.

Accordingly on this day, the matter being again mentioned, and the substance of the affidavits fully stated;

LORD ELLENBOROUGH, C. J. said: It appears that the mother of the child, so called, had it in her quiet possession, under her own care and protection, during the period of nurture. That she was first divested of her possession by stratagem, and after recovering it again was afterwards dispossessed of it by force. In such a case, every thing is to be presumed in her favour. Without touching, therefore, the question of guardianship, we think that this is a proper occasion for the Court, by means of this remedial writ, to restore the child to the same quiet custody in which it was before the transactions happened which are the subject of complaint; leaving to the proper forum the decision of any question touching the right of custody and guardianship of this child with which we do not meddle.(a)

Writ granted.

Gould and Another v. Holmstrom.

7 East, 580. June 21, 1806.

Bail in error, who were excepted to, and did not justify, were relieved from proceedings against them, though no other bail had been put in; but they were made to pay the costs up to this time, the plaintiff having been induced by former cases to proceed against them.

UPON a rule nisi for entering an *exoneretur* upon the bail-piece, and to stay proceedings against the bail in error, it appeared that judgment was signed in this, the original action, in *Trinity* term 1805; and on the 16th of *July* following, a writ of error was brought, when *Pitt and Gerrard* were put in as bail in error, who were excepted to on the 20th; and on the 24th, a notice of justification was given that they would justify on the first day of *Michaelmas* term last; but they never did justify, though they remained on the bail-piece; and on the 20th of *January* 1806, the writ of error was non-prossed for want of the bail justifying.

Park and *Bowen* shewed cause against the rule, and contended that the bail were liable, though they were at first excepted to, and had not justified; for they still remained upon the bail-piece, and might have rendered their principal;(b) and he had had all the benefit of delaying the original plaintiff's suit by means of such bail put in. They said, that there was no instance of the first excepted bail being exonerated, unless other bail had been put in and justified; as in *Jones v. Tubb*, 1 Wils. 237, and *Sayer*, 58; *Fulk v. Bourke*, 1 Blac. 462, and *Waller v. Green*, *Sayer*, 308.

Sir *V. Gibbs*, in support of the rule, said that the only necessity for bail in error since the statutes of Car. 2, was to stay execution; but they must be such bail as the Court shall allow of;(c) and that description does not apply to bail excepted to and not justifying. The defendants in error, by excepting to, reject as far as in them lies, the bail, and make their election to sue out execution on the original judgment if the bail do not justify; which they might have done in this case. And it is no objection that the original plaintiffs were prevented from suing out execution during the long vacation; for so they would have been before the stat. 16 & 17 Car. 2. c. 8. s. 3, being tied up by the writ of error. Besides, it was according to the practice of the Court in this case to take till the then next term to see whether the bail should be allowed or not, of which no party can complain. At any rate, the plaintiffs

(a) Vid. *De Manneville's case*, 10 Ves. jun. 59.

(b) Vi. *Rez v. The Sheriff of Essex*, 5 Term Rep. 633.

(c) Vi. 3 Jac. 1. c. 8, made perpetual by 3 Car. 1. c. 4. s. 4, and 13 Car. 2. st. 2. c. 2. s. 9, and 16 & 17 Car. 2. c. 8. s. 3.

should have withdrawn their exception to the bail before they proceeded against them.

The Court then said, that the party who takes exception to the bail put in considers them as no bail unless they justify, and therefore not having justified, they must be considered as no bail. But inasmuch as the bail had neglected to apply to the Court to be struck out of the bail-piece, by which the plaintiffs had been induced to commence proceedings against them, on the authority of the former cases, the Court directed the bail to pay the costs of those proceedings up to this time, and them to be discharged.

Rule discharged.

Wardell v. Gooch.

7 East, 582. June 21, 1806.

The Court will discharge a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff, knowing at the time that she was a married woman, though living apart from her husband, with a separate maintenance.

GARROW had obtained a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of custody on filing common bail, on an affidavit that she was a married woman at the time of the debt contracted, which was for goods sold and delivered, and that the plaintiff knew it.

Sir V. Gibbs, who now shewed cause, said that it also appeared by affidavit that the defendant was living apart from her husband at the time, and had a separate maintenance.(a) But

Lord ELLENBOROUGH, C. J. said, that he saw no objection to relieving her in this summary way; the plaintiff having dealt with her, knowing her to be a married woman.

Per Curiam,

Rule absolute.(b)

Richmond v. Johnson, Clerk.

7 East, 583. June 21, 1806.

If there be a certificate against any more costs than damages, upon the stat. 43 Eliz. c. 6. s. 2, the plaintiff shall not have the costs of the double pleas on which all the issues were found for him, although the judge have not certified under the stat. 4 Ann. c. 16. s. 5, that the defendant had probable cause to plead the several special matters; that section which says, that "if a verdict be found on any issue for the plaintiff, costs shall be given, &c. unless the judge, who tried the said issue, shall certify," &c. not applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs.

TRESPASS for taking and carrying away the plaintiff's goose, and converting it to the defendant's use. Pleas, 1st, not guilty. 2d, (with leave of the court) a justification, that the defendant, as vicar, &c. was entitled to the tithe of geese, and that the plaintiff being liable, &c. rendered, and the defendant accepted the goose as tithe. 3d, (with like leave) that the goose was taken by the licence of the plaintiff: on all which issues were taken, and a general verdict was found for the plaintiff, on the whole, with 3s. damages. And the Judge having certified against any more costs than damages on the stat. 43 Eliz. c. 6. s. 2; but not having certified on the stat. 4 Ann. c. 16. s. 5, that the defendant had a probable cause to plead the several special matters; a rule nisi was obtained for directing the master to allow the plaintiff

(a) *Vi. Corbett v. Poelnitz et uz.* 1 Term Rep. 5.

(b) *Vi. Marshall v. Ruston*, 8 Term Rep. 545. [See also additions by the present editor to Harg. & But. Co. Litt. vol. 3. 133. a. n. (3).]

the costs of the special pleas found for him, upon the authority of the stat. of Anne, which directs that if a verdict be found upon any such issue for the plaintiff, costs *shall* be given *at the discretion of the Court*, unless the Judge who tried the said issue shall *certify* that the defendant had a probable cause to plead such matter, &c.

Walton shewed cause against the rule, and argued that the stat. of Anne was not meant to repeal the statute of Elizabeth, and did not apply to a case where all the issues being found for the plaintiff, he would have been entitled to his costs, of course, except for the certificate granted under the statute of Elizabeth. But that the stat. of Anne only applied to cases where several justifications being pleaded which would bar the action, one of them is found for the defendant, which would entitle him to the costs of the cause; there, unless the judge certify that the defendant had probable cause to plead the other bars which are found for the plaintiff, the latter shall be entitled to deduct the costs of those unnecessary pleadings. And he referred to *Howard v. Cheshire*, Sayer, 260, as in point; where it is said to have been resolved at a meeting of all the judges, that if there be a certificate upon the stat. 43 Eliz. the plaintiff shall not have the costs of any plea pleaded with leave of the Court; although the issue be found for him, *and the judge have not certified that the defendant had a probable cause for pleading the matter therein pleaded.*

Hullock, in support of the rule, denied the authority of that case, and said that the reasoning on which it was decided was not well founded. Before the statute of Anne a defendant could not plead more than one plea in bar, and when the legislature gave him the privilege to plead several bars, it was not meant that he should exercise it at the expence and to the oppression of the plaintiff: and therefore the statute directs, that if a verdict shall be found on any issue for the plaintiff, costs shall be given, *unless* the judge certify. It is true, that those costs, are there said to be *at the discretion of the Court*; but that is only as to the *quantum*, and does not extend to the denial of costs altogether. And if this construction hold, as it is admitted, where *one* of the issues is found for the defendant, *a fortiori* it must hold where they are *all* found for the plaintiff. And he referred to *Jones v. Davies*, Barnes, 140; *Greenhow v. Isley*, Barnes, 136, and *Duberly v. Page*, 2 Term Rep. 391, as having put a different construction on the statutes to that adopted in *Howard v. Cheshire*, and as having decided that the Court have no discretion under the stat. of Anne to deny the costs of double pleas found for the plaintiff, unless the judge certify for the defendant under that statute. And he put the case, that the plaintiff had demurred to one of the special pleas, and afterwards had obtained a general verdict for 3s. at the trial, and the judge had certified against more costs than damages under the stat. of Elizabeth; after which the plaintiff obtained judgment on the argument of the demurrer: it could not be supposed that the certificate of the judge *at nisi prius* could bar the plaintiff of the costs of his demurrer.

The Court observed, that in none of the cases cited by the plaintiff's counsel was there any certificate granted under the statute of Elizabeth to deprive the plaintiff of full costs. And in order to try whether this were a case within the 5th section of the stat. of Anne, (and if it were not, it was admitted that the certificate under the stat. of Elizabeth would bar the plaintiff of his full costs, notwithstanding the double pleas pleaded by leave of the Court under the 4th sec. of the stat. of Ann.) they asked whether in this case, where all the pleas were found for the plaintiff, if the judge had certified under the statute of Anne, that the defendant had probable cause for pleading them, and had not certified against full costs under the statute of Elizabeth, such certificate under the statute of Anne could have deprived the plaintiff of his costs? To which, if no satisfactory answer could be given, (and none was given) they thought it a material argument to shew that the 5th section of the stat. of Anne only applied to a case where one of the special pleas was found for

the defendant. And presently after *Walton* drew the attention of the Court to the wording of that section; which was, that "if a verdict shall be found upon any *issue* (not *issues*) in the said cause for the plaintiff, costs shall be given, &c."

Hullock referred also to *Dodd v. Joddrell*, 2 Term Rep. 235; *Brook v. Willet*, 2 H. Blac. 435; *Vollum v. Simpson*, 2 Bos. & Pull. 368, and *Bartlet v. Spooner*, Bull. N. P. 335, as further exemplifying the construction put upon the statute of Anne, which he had contended for.

LORD ELLENBOROUGH, C. J. We will look into the cases, and if any doubt should occur we will mention it again. But at present I am inclined to think that the plaintiff is deprived of his costs by the certificate granted under the st. 43 Eliz. It is clear that such would be the effect of the certificate, except so far as it is controuled by the 5th section of the stat. of Anne. That statute meant to give an advantage to a defendant of pleading several matters; though in so doing it provided that such privilege should not be exercised vexatiously to the plaintiff: therefore it says, that if any *issue* shall be found for the plaintiff, he shall have costs, &c. unless, &c. by which I understand, that if any one or more, of several issues be found for the plaintiff, the rest being found for the defendant, the plaintiff shall have his costs of those pleas found for him, unless the judge shall certify, &c. This was to check a superfluity of pleading; and was necessary to be introduced where any one bar was found for the defendant, which would give him the general costs of the cause, except for this provision: but where all the issues were found for the plaintiff, he did not want any new provision to give him the costs of the pleadings. And this shews that the statute of Anne was not meant to apply to such a case. Where indeed the case is within the 5th section of that statute, as if upon a demurrer joined the matter be judged insufficient, the costs are in the discretion of the Court only as to the quantum: that is, to be taxed by the proper officer as in other cases; or if a verdict be found upon any issue for the plaintiff, &c. which is to be understood in the sense I have before mentioned: "unless the judge who tried the *said issue* shall certify," &c.: and in that case the defendant shall be exempted from the costs of those issues found for the plaintiff, which he would otherwise have been obliged to pay. But here the certificate under the statute of Elizabeth has taken away from the plaintiff all the costs as to all the issues to which he would have been entitled without the aid of the 5th section of the statute of Anne.

The other judges expressed their decided opinions that the 5th section of the statute of Anne had no reference to this case where all the issues were found for the plaintiff, and *Lawrence, J.* added, that the question ought not to be disturbed after having been decided by the opinion of all the judges, as reported in the case in *Sayer*.

Rule discharged.

The King v. The Inhabitants of the West Riding of the County of York.

7 East, 588. June 23, 1806.

By the common law declared and defined by the stat. 22 H. 8. c. 5, and subsequent acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the highway at each end of the bridge: and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same.

AT the summer assizes at *York* in 1803, this indictment, found at the former assizes, was tried, for a nuisance in not repairing a certain highway;

upon which a special verdict was found, which was removed by *certiorari* before judgment into this court.

The indictment stated that from time immemorial there was and yet is a common and ancient king's highway, leading from the market town of *Huddersfield* in the West Riding of the county of *York* towards and unto the market town of *Manchester* in the county palatine of *Lancaster*, in, through, and over the township of *Quick* in the West Riding, &c. used for all the liege subjects of the king for themselves and with carriages, &c. to pass, &c. And that a certain part of the said highway, at the said township of *Quick* in the West Riding, &c. to wit, a certain part thereof lying next adjoining the west end of a certain public bridge there, called *Tamewater Bridge*, and within the distance of 300 feet thereof, beginning at the west end of the said public bridge, and extending from thence westwards, containing in length 45 feet and in breadth seven yards, and a certain other part thereof lying next adjoining to the east end of the said bridge, and within the distance of 300 feet thereof, beginning at the east end of the said bridge, and extending from thence eastwards, containing in length 150 feet, and in breadth seven yards, on the 2d of *March* 42 Geo. 3. &c., at the said township of *Quick*, &c. was, and yet is, very ruinous, and in decay for want of repair, &c.; so that the subjects of the king cannot safely pass; to the common nuisance, &c., against the peace, &c. and against the form of the statutes. And that the inhabitants of the West Riding of the county of *York* the said common highway, so as aforesaid being in decay, of right ought to repair and amend, when and so often as it shall be necessary. To this the inhabitants of the West Riding pleaded *Not guilty*; and upon the trial by a jury of the neighbourhood of the town of *Leeds*, being next adjoining to the West Riding returned by the sheriff, according to a special writ directed to him for this purpose, a special verdict was found, stating in substance;

That from time immemorial there has been, and yet is, a common public highway for carriages, &c. from *Huddersfield* to *Manchester*, leading through the township of *Quick* in the West Riding of *Yorkshire*, and across the river *Tame* there flowing: and that from time immemorial until within time of living memory there was no bridge across the river *Tame* at *Quick*, except a foot bridge, and all persons having occasion to cross the river there with cattle and carriages went across a ford in the river; the foot bridge being a little higher up the river than the ford. That before the year 1756, a stone bridge for carriages, &c. called *Tamewater Bridge*, was erected by voluntary subscriptions at *Quick*, five or six yards higher up the river than the ford; which stone bridge was in that year swept away by a flood, when the bridge was rebuilt with stone by voluntary subscriptions, and made a little longer than the former bridge, and erected at the ends of the said highway next the river; which continued until *August* 1799, when it was again swept away by a flood; and thereupon the same was again rebuilt with stone by and at the expence of the inhabitants of the West Riding, and was finished on the 2d of *March* 42 Geo. 3, the day mentioned in the indictment, and still continues there. And that these several stone bridges have been publicly used, and have been and are of great public use and benefit; and that the present bridge has been maintained and repaired, and is maintainable and repairable by the inhabitants of the West Riding. That the present stone bridge was made by the inhabitants of the West Riding larger and wider than either of the preceding bridges; and that the parts of the highway next adjoining to the east and west ends respectively of the present bridge, (being the parts of the highway during the time that the same was so out of repair as in the indictment mentioned) were made higher in order to come up to the said bridge, and wider than they were before. That the township of *Quick* lies in the parish of *Saddleworth* in the said Riding, which parish has been immemorially divided into four districts called *Mears*, in one of which mears, called *Shaw Mear*, the highway in *Quick* next

adjoining the west end of the bridge lies; and in another of which mears, called *Lords Mear*, the highway in *Quick* next adjoining the east end of the bridge lies: and that the inhabitants of these respective mears have respectively repaired and maintained from time immemorial the said respective parts of the highway adjoining the east and west ends of the ford before the building of the first mentioned carriage bridge, &c. and since adjoining to the respective ends of the present bridge when the same has been out of repair; and that the parts of the highway indicted, were out of repair, &c. But whether, &c.

Hobroyd for the prosecution. The Riding being liable to the repair of the bridge is in consequence liable to the repair of 300 feet of the highway adjoining each end of it. And no question can arise as to any special liability of the respective Mears, because the general issue only is pleaded; and any question of that sort can only be raised by a special plea. The stat. 22 H. 8 c. 5, for repair of bridges and highways is framed upon the presumption that the inhabitants of the county were at common law bound to repair the bridges within the same, where no other persons were specially chargeable for such repairs; for the statute does not create the charge, but only directs the manner in which it shall be imposed. The same observation applies to the 300 feet of highway at each end of the bridge. It directs (s. 9.) that such portion of the highway shall be amended as often as need shall require, without saying by whom: and it directs the justices of the peace to inquire, hear, and determine in their sessions respecting the repairing of the same, "in as large and ample manner as they might do to and for the making and repairing of bridges by virtue of that act." Now the power given them is to tax the inhabitants of the county, which would be absurd and unjust, if they were not the persons bound to the repair of the highways at the ends of the bridge. The statute, therefore, being only declaratory of the common law, the particular and summary remedy therein prescribed need not be pursued; but an indictment lies at common law for the nuisance. Lord *Coke*, 2 Inst. 700, 1, 5, in his comment on this statute, not only considers that the county is at common law liable to the repair of bridges,^(a) but also of the 300 feet of highway adjoining the ends thereof; one of them, as he says, depending upon the other. So in 13 Rep. 33, after saying that of common right all the county shall be charged to the reparation of a bridge, because it is a common easement for the whole county, and that the stat. 22 H. 8. c. 5, was but an affirmation of the common law; Lord *Coke* adds, "So it is of a *highway* of common right; all the *county* ought to repair it, because that the county have their ease and passage by it; which stands with the reason of the case of the bridge;" which shews that he was speaking of the highways at the ends of bridges. The reason is obvious, that where there is a bridge, it necessarily brings a greater concourse of persons from the neighbouring country to that spot, in order to pass the river with more convenience; and the repair of the highways at the ends of the bridge is no more than a compensation to the parish wherein the bridge stands for the increased use and expence of its roads. Dalton, c. 16, and Crompton, 186 b, are also of the same opinion. These refer to 43 Assize, pl. 37:^(b) where it was presented in *B. R.* that the Abbot of *Combe* ought to repair *Chesterford* bridge, in the county of *Leicester*; to which he alleged a prior record in the same Court, by which he was charged with the repair of the same bridge; to which he pleaded that he was only bound to repair two arches of it: and the issue being joined thereon, the jury found quod Abbas de C. non tenetur reparare nisi duas arches pontis de C, et pontem ultra cursum aquæ, et non fines ejusdem pontis. To which *Knivet*, J. said, we must intend that you are bound to repair the bridge, and the highway adjoining to each end of

(a) And Vide *Rez v. West Riding of York*, 2 East, 348.

(b) This is stated in Bro. tit. Presentments in Courts, 22 & 29, but more fully in Fitzb. Compt. Just. 186, and vide Fitz. Nat. Brev. 127, writ de Reparatione Facienda.

it, although the soil be in another; because the easement shall be preserved to the people, &c. And as it is not found by the record who ought to repair the remainder of the bridge, without which the repair of the two arches will be of no use, you cannot go acquitted, but must answer over. This must have proceeded upon the same principle as where the owners of a certain estate are bound to the repair of a bridge or road; it is sufficient to indict any one who is in the possession of part of the estate, and he must get his contribution from the rest. So the subsequent statutes of the 1 Ann. st. 1. c. 18. 8. 3. 5. & 13, and the 12 Geo. 2. c. 29, which are legislative expositions of the stat. of H. 8, assume the liability of the county to repair as well the highways at the ends of bridges, as the bridges themselves.

Lambe, contra. Admitting that decided cases (a) have established the liability of the county to repair public bridges at common law; yet such liability has never been extended to the highways at the ends of bridges: nor does it attach in any case where any other persons are found to be liable for the repairs, as the *Mears* are in this case. At common law, the *parish*, and not the county, is bound to repair public highways within it; and therefore the county was not bound to plead specially; but it lay rather on the prosecutor to shew such special matter in the indictment as would charge the county, against common right, with the repair of the highways in question; as by reason of the statute of Hen. 8, and the appointment of the justices in pursuance of the directions of that act. [It was observed, that the indictment charged the non-repair to be *against the form of the statutes*.] The statute only gives the justices a power to inquire, hear, and determine who are liable to the repair of bridges and highways, and to make such process upon every presentment before them against such as ought to be charged for the repair, "as it shall seem by their discretions to be necessary and convenient for the speedy amendment thereof." To avoid all difficulty as to the exact limit where the bridge ended and the common highway began, the justices had power given them to exercise their discretion within 300 feet how far the county (where no other was found specially liable to the repair) should repair it; and to that extent they are required to tax the inhabitants of the county. Then that method ought to have been pursued which the statute points out, and not the remedy by indictment, which is not given. The 3d section, which expressly creates the duty of the county to repair decayed bridges, where, according to the 2d section, it is not known who else are liable, is silent as to the repair of the highways at the ends: and therefore no indictment lies in this case in that general clause. And if this could be maintained it would take away the discretion which the act meant to vest in the justices. [Lord *Ellenborough*, C. J. The discretion given is rather as to how much of the three hundred feet is necessary to be repaired.] The discretion is as to the apportioning how much of the three hundred feet should be repaired by the county, and how much by the parish, where, as is said in 2 Inst. 705, no others are found liable to repair the whole. The application should have been for a *mandamus* to the justices to apportion the respective parts. And this is analogous to other cases, as where highways are found to be narrow, a discretionary power is given by the general highway act to the magistrates on application in certain cases and within certain limits to widen them; but no indictment lies against the parish for not widening them. Neither can any instance be found of an indictment against a county for the non-repair of the highways at the ends of bridges. The case in 43 Assize, pl. 37, is merely the opinion of a single judge, and the result of it is not intelligible. The abbot, in answer to a presentment for the non-repair of a bridge, shewed by the finding of a jury on a former presentment, that he was only liable to repair two arches of the bridge; and yet he is not

(a) They are all collected in *Rex v. The Inhabitants of the West Riding of Yorkshire*, 2 East, 342.

acquitted, because he did not repair the highways at the end of the bridge, or shew who else was liable. [Lord *Ellenborough*, C. J. The case shews the general opinion then entertained that the highways at the ends of bridges were considered as excrescences of the bridges themselves, and that the liability to repair the one followed the other.] The statutes of Anne and Geo. 2, do not carry the matter further than the prior statute of Hen. 8.

Holroyd in reply. The argument of the defendants is founded upon the assumption that the county is not liable at common law to the repair of the highways adjoining the ends of bridges, which is contradicted by the authorities cited. The statute of Hen. 8, merely fixed the limit of the liability at 300 feet from the ends of the bridge, which before might have been doubtful at common law, or have depended upon the particular circumstances of each case. But the statute itself assumes the prior liability, and merely directs how the county shall be assessed. Then if the county be *prima facie* liable at common law, it can only get rid of the indictment by shewing specially some other person bound by tenure or prescription to sustain the charge. *Rex v. The City of Norwich*, 1 Stra. 180, 182.

LORD ELLENBOROUGH, C. J. As this case comes before us upon a special verdict, and will probably be carried further, we will consider it together; though I have no doubt at present upon the subject. I consider it as having been laid down long ago by Lord *Coke*, that the 300 feet of highway at the ends of the bridge are to be taken as part of the bridge itself; being in the nature of the thing intimately connected with it, and the exact limits difficult in some cases to be ascertained from the continuation of arches beyond the sides of the river. The stat. of Hen. 8, meant to define the limit which perhaps was uncertain at common law; but the statute still proceeds upon the assumption that there existed a common law liability for the county to repair the highways at the ends of the bridge as well as the bridge itself, as appendages to it. All the authorities cited go to shew that; and so do the requisitions of the subsequent statutes of Anne and Geo. 2. The only question is, Whether, as up to the time of the indictment for the non-repair of this newly erected bridge in the place of the former bridge, the Mears had been in the habit of repairing the highways at the ends of the bridge, that makes any difference? But it seems to me, that the new bridge, having been once adopted as a public bridge, must be taken to be so with all its consequences and appendages. And even if that were otherwise, it may be proper to consider whether the special matter found by the jury should not have been pleaded.

Cur. adv. vult.

His lordship now delivered the unanimous opinion of the Court. After stating the indictment and special verdict—

The single question arising on this special verdict is, Whether the highway, adjoining a common public bridge, at each end thereof, to the extent of 300 feet from the bridge, is of common right to be repaired by the inhabitants of the County or Riding in which such bridge stands? or, in other words, Whether a different rule of law prevails with respect to the 300 feet of the highway at each end of a public bridge from that which prevails with respect to the bridge itself; for it seems to be admitted in argument on the part of the defendants, that this *Tamewater Bridge* is of common right to be repaired by all the inhabitants of the West Riding; and that if the highway at each end of it, to the length of 300 feet, be by the common law subject to the same rule, as to repairs, as the bridge itself, that, notwithstanding the facts found by this special verdict, inasmuch as the defendants have pleaded only *not Guilty*, and not shewn by plea that any other persons are bound by tenure or prescription to repair it, the common law liability of the defendants must remain. After the case of *The King against The Inhabitants of the West Riding of Yorkshire*, 5 Burr. 2594, respecting the bridge over

Glusburne Beck, it could not be argued that this bridge, though built originally by subscription in lieu of a foot bridge, having become of public use and benefit, was not chargeable on the Riding at large. But it has been endeavoured to separate the highway at each end of the bridge from the bridge itself, and to subject it to a different rule of law. This we think cannot be done. The highway within the limits of 300 feet at each end is dependent on the bridge as to its form and dimensions; its level must be varied as the bridge is made higher or lower, so as to make the ascent or descent more gradual: and we see no reason to construe the stat. 22 Hen. 8, as declaratory of the common law with respect to bridges, and introductory of a new rule of law with respect to the highways at each end of them. The stat. 1 Ann. stat. 1. c. 18, made for explaining and altering the stat. 22 H. 8, favours this construction: all its clauses and provisions coupling the bridge with the highway, and considering them as bound by the same rule of law with respect to the repairs of them. So the law was understood by the Judges in the time of Ed. 3, as appears by the case cited by Mr. *Holtroyd* from the *Year Book*, 43 Assize pl. 37, and referred to in Bro. Ab. pl. 22, *Presentments in Courts*. The case is this.—It was presented in the King's Bench before *Knivet* and *Ing.* that the abbot of *Combe* ought to repair the bridge of *Chesterford*, in the county of *Leicester*; upon which a distress was awarded against the abbot; who now came and alleged a record in the same Court of King's Bench, that how he was heretofore before *Chebre* impeached for the same bridge; when he came and pleaded that he was not bound to repair, except two arches of the same bridge; upon which issue was joined; and the inquest came and found for the abbot. Judgment if he should be now charged. And the record was read, which was, "Whereupon the jury, &c. who say upon their oaths that the abbot of *C.* is not bound to repair, except two arches of the bridge of *T.* and the bridge *ultra cursum aquæ*, and not the ends of the bridge." *Knivet.* We intend that you are bound to repair the bridge, and the highway adjoining the one end of it and the other, although the soil may be in another; so that the easement shall be saved to the public. And you are bound to make the bridge of sufficient height and strength for the course of the water. And although by the accretion of water the ends shall be removed, yet you are bound to pursue the course of the water, and to repair the highway, without leave of him to whom the land belongeth. And inasmuch as in this case it is not found nor limited in the record who ought to repair the remainder of the bridge, and without doing so it will be of no value: although it should be found that the arches are sufficiently made, yet this shall not discharge you: therefore see whether you can say any thing else. From this case it is clear, that in those days the charge of repairing the highways at the ends of a bridge was considered as belonging *prima facie* to the party charged with the repair of the bridge itself. And the statute of H. 8, may be considered as having specified the distance of 300 feet from the ends of bridges, for the purpose of reducing to more convenient certainty what should in all cases thereafter be considered as the extent and limit of this charge upon the county. We are therefore of opinion that upon the facts stated on this record, judgment must pass for the crown.

Judgment for the crown.

The King v. The Bishop of Oxford:

7 East, 600. June 23, 1806.

A chapel in the township of *P.* was endowed in 1428 by a deed executed by the then proprietor of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby, in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to

the vicar from the said inhabitants and should be appointed by them; under which deed they continued to exercise the power of appointment and presentation. In 1797, an act passed for inclosing open lands in the township, in which it is recited, as if a matter of doubt, whether the curate were entitled to the small tithes, or to a *modus* in lieu of tithes; the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and to the money-payment of 40*l.* 8*s.* 2*d.* annually, payable out of the lands and hereditaments in P. in right of the said curacy, together with surplice fees, and all other profits, privileges, and appurtenances to the same belonging, and of right payable. That the inhabitants considering that sum not sufficient for the proper support of the curate had voluntarily agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.*; with a proviso that it "shall not in any respect alter the money-payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been TIME IMMEMORIAL charged in right of the said church." Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was simoniacal, and the presentation made thereon void. And the right of presentation having thereupon devolved on the Crown by stat. 31 Eliz. c. 6. s. 5, whose presentee had been licenced by the ordinary, a *mandamus* to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs.

THE former writ(a) having been quashed for insufficiency, a new rule was obtained calling upon the bishop to shew cause why a writ of *mandamus* should not issue, commanding him to licence the Rev. Isaac Knipe, clerk, to officiate as chaplain or curate of the church or chapel of *Piddington* in the parish of *Ambrosden*, in the county and diocese of *Oxford*.

The affidavits in support of the rule stated, that from time immemorial there was a church or chapel in the township of *Piddington*, in which divine service and other ecclesiastical duties have immemorially been performed by a chaplain or curate in priest's orders, nominated and appointed by the inhabitants of the township, or the major part of them; which right either originated or was confirmed by a deed of 1428, between the then impropiator of the rectory of *Ambrosden*, the then vicar of the parish, and the inhabitants of *Piddington*, confirmed by the decretal order of the then diocesan. By that deed it was provided, that the curate should wholly receive all the tithes, real or personal, greater, lesser, or small, and all other emoluments and profits, &c. due from the inhabitants of the township to the vicar; in lieu whereof the said inhabitants were to pay to the vicar 20*s.* a year. The affidavits then stated, that the chapel became vacant on the 12th of May 1801, by the death of the curate. That in June 1801, one of the churchwardens of the township waited on the bishop, and informed him that the salary of 40*l.* a year, which had been theretofore paid to the curate, not being considered by the inhabitants as sufficient, they had agreed to make an addition of 30*l.* a year to it; to which the bishop appeared then to have no objection. That there was a meeting of the inhabitants on the 9th of September following, to nominate another curate, when Mr. Stopes and Mr. Pearson offered themselves as candidates; and the latter having been nominated by a majority of the inhabitants, applied to the bishop for a licence: but the bishop, having inquired concerning the existence of a certain agreement between Mr. Pearson and the inhabitants, upon which he had been presented, and the agreement (as after stated) being then produced by Mr. Pearson, declared that he thought it simoniacal, and refused his licence. Upon which the inhabitants offered to cancel the agreement and waive their nomination; and on the 4th of May 1802, at another meeting, they nominated Mr. Knipe, who afterwards applied to the bishop for a licence, and was refused; the bishop informing the parties, that his objection to Mr. Pearson's nomination, which he considered to be simoniacal, was not removed. It was further stated, that an action for simony had been

(a) Vide *ante*, 345, S. C. upon another point.

brought by Mr. *Mathews*, (who had been nominated to the curacy by the crown) against several of the inhabitants who had signed the agreement with Mr. *Pearson*, in which action the plaintiff was nonsuited, at the summer assizes at *Oxford* in 1803: (but this, as it appeared by the affidavits against the rule, was upon a defect of formal proof.)

The agreement in question was as follows. "At a meeting of the inhabitants of *Piddington*, 9th September 1801, for the purpose of electing a resident curate or chaplain to the church of *P.*, the Rev. *Isaac Pearson* was, by the inhabitants, appointed resident curate or chaplain, and to the possession of the parsonage house, and also to the money payment of 40*l.* 8*s.* 2*d.* annually payable out of the lands and hereditaments in *P.* in right of the said curacy, together with the said surplice fees and all other profits, privileges, and appurtenances to the same belonging, and of right payable. And the inhabitants aforesaid, considering the present stipend or money-payment of 40*l.* 8*s.* 2*d.* with the surplice fees, of themselves insufficient for the proper support of such resident curate, have voluntarily consented and agreed with the said *J. Pearson*, that upon his entering upon such curacy at *Michaelmas* next, and performing the usual duties of the church, &c. together with such weekly duty as hath been customary and may be required, they, the said inhabitants, will, by a rate to be made by the churchwardens of *P.*, now and for the time being, or by some other means, raise and pay out of the lands and hereditaments in *P.* 29*l.* 11*s.* 10*d.* in addition to the said money-payment, &c. Provided, and it is hereby agreed, that the payment of the said 29*l.* 11*s.* 10*d.* shall be made and continued only upon the occupiers of lands and hereditaments in *P.* aforesaid, and shall not, in any respect, alter the money-payment of 40*l.* 8*s.* 2*d.* wherewith the said lands and hereditaments are, and have been time immemorial, charged in right of the said church. And lastly, the said *J. Pearson* doth hereby consent and agree to accept the said curacy or chaplainship upon the terms herein before mentioned. (Signed by *J. Pearson*, and by the principal inhabitants and parish-officers.)

The affidavits in answer to the rule, stated that in June 1801, when the meeting of the inhabitants of *Piddington* took place after the vacancy, the bishop was entirely ignorant of the rights of the curate; and was then informed that the salary was a fixed sum of 40*l.*; and inquiring how it was so settled, was referred by one of the parties to an act for the inclosure of the township of *Piddington*. That the bishop, under such ignorance of the rights of the curate, expressed his approbation of raising the stipend to 70*l.* a-year, as it was proposed to do. But upon reference afterwards to the *Piddington* inclosure act, (about 1797), it was found to recite that the chaplain or curate of *P.* was entitled either to the small tithes, or else to a modus or composition of 18*s.* for every yard land, and so in proportion, in lieu of all tithing whatsoever: and it provides, that nothing in the act contained shall extend to establish or annul, or to strengthen or weaken in any wise the right or claim which the curate of *P.* had or might have to any small tithes, or to determine or imply that he was, or was not, entitled to the same. And on subsequent inquiry it appeared, that by the endowment of *Piddington*, in 1428, the curate was entitled to all the small tithes; in consequence of which the rights of the curate had been reserved by the act of parliament. That in the survey returned into the Exchequer in the time of Queen *Anna*, the curacy was valued at 41*l.* 7*s.* 8*d.*, and the small tithes were now estimated at above 130*l.* per annum: and that the vicarage of the parish of *Ambrosden*, which was then returned at 42*l.* 5*s.* 3*d.* is now reputed to be worth 200*l.* per annum. That Mr. *Stopes*, the other candidate with Mr. *Pearson*, refused to sign the agreement in question as simoniacal in agreeing to accept 70*l.* per annum in lieu of small tithes; in consequence of which refusal the inhabitants nominated Mr. *Pearson*, without opposition. That the inhabitants afterwards offered to give up the agreement, proposing however that Mr. *Pearson* should be bound in honour

by it : to which the bishop gave his positive negative, and said that he felt it his duty not to license any person who was not perfectly free to assert his rights. That in consequence of this agreement the nomination having been simoniacal and void, the right of nomination vested in the king, who, on the 1st of July 1803, nominated the Rev. Mr. *Mathews*, to whom the bishop granted his licence accordingly.

The sole question now was, Whether the agreement in question were or were not simoniacal and void? upon which Sir *V. Gibbs* and *Abbott* were heard against the rule; and *Williams*, Serjt., *Milles*, and *Manley* in support of it.

LORD ELLENBOROUGH, C. J. In construing the agreement, whether it be simoniacal or not, I shall look only at the agreement itself, and the act of parliament, which states the doubt whether the curate be entitled to take the small tithes in kind, or to a modus. This doubt is stated in an act of parliament which passed four years before the election; and yet when the inhabitants come to elect a curate, they make a stipulation with one of the candidates, that he shall sign an agreement whereby he admits that 40*l.* 8*s.* 2*d.* is the *immemorial* money-payment to the curate out of the lands of the township. He was therefore intended to be estopped by his own agreement from insisting upon the right of the curate to the small tithes, and to furnish evidence against the right, to be preserved probably in the parish chest. This I am clearly of opinion was simoniacal. If a presentee do but bargain with his patron to forbear any suit, for the purpose of trying by due course of law whether or not he be entitled to small tithes, that is an agreement for a *benefit* within the statute 31 Eliz. c. 6. (s. 5,) and amounts to simony.

GROSE, J. It is impossible not to see that this agreement was a *benefit* to the inhabitants by whom the curate was appointed, and that it was so intended to be: and therefore simoniacal. And if the rights of the curate had been as well known at the time of passing the *Piddington* inclosure act, as they now appear to be, the provisions of it would probably have been very different. This Court, however, will not assist simony.

LAWRENCE, J. If the parties who present are to derive any *benefit* from their presentee, it is clearly simoniacal. Now, if the presentee himself is not only to be estopped from claiming the small tithes, but is also to furnish evidence against future curates who might be disposed to claim them in favour of the parishioners, there can be no doubt but that it is simony. The agreement is artfully drawn, and on the first reading of it I doubted whether the words "*time immemorial*," (applied to the money-payment of 40*l.* 2*s.* 8*d.*, wherewith the agreement states that the lands have been from *time immemorial* charged) might not have been introduced by accident; but on consideration I am satisfied that they were introduced intentionally. Four years before, when the act passed, the matter was left in doubt, when it is evident that the attention of the parties concerned must have been called to the question; and that accounts for the parishioners introducing those words into the agreement, to endeavour to get rid of the curate's claim to the small tithes.

LE BLANC, J. The matter must have been much discussed at the time when the local act passed, and the attention of the inhabitants must have been then called to the situation and claims of the curate. With this knowledge of the matter, the very next time that the inhabitants come to exercise their right of election, they require of the candidates to sign an agreement, including an admission that the annual payment of 40*l.* 2*s.* 8*d.* to the curate has been from *time immemorial*. That leaves no room to doubt but that this was purposely introduced into the agreement in order to affect the right of the curate. If this were a matter on which any question of law could reasonably be raised, I should be sorry to conclude the inhabitants of the township by denying the *mandamus*; but it being clear that this was done intentionally, and if so, that the agreement was simoniacal, we ought not to compel the bishop to

do an act which his duty forbids him to do, and to put him to make a special return.

The Court thereupon, after alluding to what was said at the conclusion of the case of *The King* against *The Bishop of Chester*, 1 Term Rep. 405, upon the subject of applications of this sort against bishops, without a good foundation,

Discharged the Rule
with Costs.

Turner v. Cary and Others.

7 East, 607. June 23, 1806.

After default made in not putting in special bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond and proceed thereon, unless the bail be also justified, though not before excepted to.

UPON a rule for setting aside proceedings upon the bail-bond in this cause, it appeared that the writ of latitat, indorsed for special bail, was returnable on the first return of last *Easter* term, on which the defendants were arrested, and a declaration filed conditionally. The time for putting in special bail expired on the 29th of *April*; but they were not put in till the 8th of *May*, when notice thereof was served on the plaintiff's attorney, who refused to accept the notice as out of time, but did not except to the bail, and the bail did not justify. On the 12th of *May*, the plaintiff took an assignment of the bail-bond, and commenced proceedings thereon the next day. The question was, Whether the bail-bond were well assigned after special bail was put in, but not perfected, not being excepted to?

Comyn, who shewed cause against the rule, contended for the affirmative, and cited *Fuller v. Prest*, 7 Term Rep. 109, to shew that the defendant, not having perfected his bail at the day, is not in court; and that the sheriff can only relieve himself afterwards by justifying the bail, though not excepted to.

Lawes, contra, referred to *Pariente v. Plumbtree*, 2 Bos. & Pull. 35, and *Murray v. Durand*, 1 Esp. N. P. Cas. 87, there cited, to shew that the sheriff might redeem himself by putting in bail after an action commenced against him for an escape. Though, he observed, that in a subsequent case of the same sort, *Allingham v. Flower and Another*, 2 Bos. & Pull. 246, it is noticed that the bail had justified.

Per Curiam. The Master informs us, that by the practice of this Court the party making default must not only put in, but justify, bail, before he can come to the Court for any favour.

Rule discharged
with Costs.

Milne and Others, Assignees of Rhodes and Justamond, Bankrupts, v. Gratrix.

7 East, 608. June 23, 1806.

Where parties by a bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of Court, it is competent to either, even since the stat. 9 & 10 W. 3. c. 15, to revoke by deed his submission; and notify the same to the arbitrators before the authority be executed; and he cannot be attached for a contempt of Court in not obeying the award, if made after such revocation and notice; though the submission be afterwards made a rule of Court. But it seems, that it would be a contempt to revoke the submission after it had been made a rule of Court.

THIS came on upon two rules, one calling upon the defendant to shew

cause why an attachment should not issue against him for a contempt in not paying a certain sum under an award, the submission to which had been made a rule of this Court; the other calling upon the plaintiffs to shew cause why the rule making the submission to the award a rule of Court should not be discharged. The facts were shortly these; the defendant having had dealings in trade with the bankrupts before their bankruptcy, and counter claims existing between them, the assignees, after the bankruptcy, brought an action against the defendant to recover the value of certain goods of the bankrupts in his hands; and it was agreed to refer the whole matters in dispute. Accordingly, bonds of submission to arbitration were respectively executed by the plaintiffs and the defendant on the 23d of August 1805, to abide the award of two arbitrators, if made on or before the 1st of November 1805, or otherwise to abide the award of an umpire, if made on or before the 2d of December following. But on the 12th of October preceding, before the day appointed by the arbitrators for a hearing, the defendant executed a deed of revocation of his submission to the arbitration, of which the arbitrators and umpire had notice: notwithstanding which they proceeded upon the original bonds of submission, and appointed meetings to hear and determine the matters thereby submitted to them; and an award was made by the umpire within the time limited, dated the 2d of December 1805; after having been personally served with a copy of the deed of revocation on the 19th of November preceding. On the 6th of December, the defendant was served with a copy of the award; and in Hilary term last, the submission to the arbitration was made a rule of Court, at the instance of the plaintiffs; and a demand of the sum awarded was afterwards made on the defendant, who refused to pay it.

Wood and Richardson, for the plaintiffs, contended that a submission to arbitration, which was afterwards made a rule of Court under the stat. 9 & 10 W. 3. c. 15, (which rule of Court had relation to the submission) was irrevocable. They admitted that at common law the bond of submission would have been revocable, according to *Vynior's* case, 8 Rep. 82: but contended notwithstanding, that where the submission had been made a rule of Court, the Court would grant an attachment for disobedience to the award. (a) The object of the statute, however, would be defeated, unless the submission were conclusive. The title of it is, "An act for determining differences by arbitration," and in the body of the act it is said, that for the final determination of controversies, &c. be it enacted, that it shall and may be lawful for all persons desiring to end any controversies, suits, &c. to agree that their submission, &c. should be made a rule of Court; which agreement being so made and inserted in their submission, &c. shall or may be entered of record in such court, "and a rule shall thereupon be made by the said Court, that the parties shall submit to and finally be concluded by the arbitration, &c. made pursuant to such submission:" and in case of disobedience, &c. the party shall be subject to all the penalties of contemning a rule of Court, &c. The statute therefore binds the party by his agreement to the submission. By such agreement the other party acquires an interest in the authority given to the arbitrator, which the statute directs shall be entered of record, and makes it, in the nature of process, imperative on the parties. If a Judge's order be made a rule of *Nisi Prius* by consent, neither of the parties can of his own accord annul the authority by revoking his consent. And in *Lucas v. Wilson*, 2 Burr. 701, the Court said, that the object of the act was to put submissions to arbitrations in cases where there was no cause depending in court upon the same foot as those where there was a cause depending. The stat. 8 & 9 W. 3. c. 11. s. 8, only says, that in actions on bonds for a penalty the plaintiff may

(a) *Hide v. Petit*, 1 Chan. Cas. 185. In *Tremenhere v. Trevelian*, 1 Sid. 452, and 2 Keb. 645. 664, the general question as to the practice of the Court in granting attachments in such cases was adjourned for further consideration; but it was said that such attachments were constantly granted in *C. B.*

assign as many breaches as he shall think fit: but this has been holden to be imperative on the plaintiff to assign breaches; (a) and here the words of the statute are stronger.

Holroyd, contra, admitted that the defendant was liable on the bond: but denied that the statute made the submission irrevocable; and urged that there was no submission existing at the time it was supposed to be made a rule of Court, on which the statute could operate. Where therefore the rule of Court itself, founded upon the supposed consent of the parties, was really made without the consent of the defendant, of course there could be no contempt of the jurisdiction of the Court in a matter where no such jurisdiction existed; and the party could have no notice of a rule made behind his back; which would be necessary to bring him into contempt. The umpire himself had no authority to make the award, and consequently there could be no contempt in not obeying a nullity.

Lord ELLENBOROUGH, C. J. It has been properly admitted, that the defendant could not destroy his agreement to submit to the arbitration, and therefore a remedy lies upon the bond given to secure such agreement. But it is equally clear, that before the statute of William a submission to arbitration might be revoked before it was executed, and there is nothing in that statute to make it irrevocable while it continues executory. The statute says, that it shall and may be lawful for the parties to *agree* that their submission should be made a rule of Court; which *agreement*, (that is, so long as it subsists as an agreement unrescinded) shall or may be entered of record, &c. After it is made a rule of Court the party cannot indeed rescind it without incurring a breach of that rule; but till then it has its binding force as an agreement only, to submit to the award of the arbitrator, whose authority is in its nature revocable; and for the breach of which agreement the party here has a remedy of another sort. Then, if before any award made, one of the parties have revoked the authority of the arbitrators, they cannot make any award to bind him.

The other Judges concurred; *Lawrence*, J. adding that the rule for the attachment in this case was for not obeying *an award*; but if there were no authority in the umpire to make the award at the time, the award itself was a nullity, and could not be enforced. (1)

Rule absolute for discharging the Rule for making the Submission, &c. a Rule of Court; and the Rule for an attachment for Non-performance of the Award discharged.

Hodgson v. Field.

7 East, 613. June 25, 1806.

A. and *B.* being severally seised of parcels of woody ground, and *B.* having other lands adjoining to his woody ground, and intending to make a colliery under his ground, *A.* grants to *B.* his heirs and assigns, liberty for him, his heirs and assigns, to carry up a sough or drain through *A.*'s woody ground into *B.*'s woody ground, and also liberty for *B.* his heirs and assigns, to make two little sough-pits in *A.*'s woody ground, for the

(a) *Roles v. Rosewell*, 5 Term Rep. 538, and *Hardy v. Bern*, ib. 636.

(1) [The power of revoking a submission, being productive of injurious consequences, has been prohibited in England in any case where the agreement provides that the submission shall be made a Rule of Court, without leave of the Court, by stat. 3 & 4 W. 4. c. 42. s. 39. After an arbitrator has made his award, his authority cannot be revoked, even under that Statute. *Phipps v. Ingram*, 3 Dowl. P. C. 669. Where the reference is made an order of a Court of Equity, it is a high contempt to revoke. As to the circumstances under which a revocation may be bad in Equity, though good at law, see *Haggett v. Welsh*, 1 Sim. 134. *Harcourt v. Ramsbottom*, 1 J. & W. 511.—W.]

more easy and safe carrying up the tail of the sough, one of which was to be covered in as soon as conveniently might be after making the sough, and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer; and B. covenanted that he, his heirs and assigns, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough, and that A., his heirs and assigns, from time to time, and at all times after, might go down into any pit or pits of B., his heirs or assigns, to discover whether any coals of A., his heirs or assigns, should be gotten; and that B., his heirs and assigns, should repair any injury to A.'s fence, &c.: held that by the grant to B. his heirs, &c. of the liberty of making the sough in A.'s land, the liberty of making sough pits at any time afterwards, while the object of the grant remained, being necessary for the purpose of repairing the sough, passed as incident thereto: and that the use of such sough, for the carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B.: and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered in by mutual consent, was not controuled by the special liberty given for making such original sough pits, the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in B.'s woody ground and adjoining lands remained to be gotten.

TRESPASS for breaking and entering the close of the plaintiff at *Heaton* in the county of *York*, and digging a pit or hole there, and for opening and uncovering a sough or drain in the said close, and continuing the said pit and sough opened and uncovered for a long time, &c. and thereby disturbing the plaintiff in his possession and occupation of the said close. *Pleas, 1st, Not guilty.* 2d, That the *locus in quo* at the times when, &c. was a piece of woody ground situate in *Heaton*, abutting to the south upon a brook there, and upon another part thereof contiguous and next adjoining to the parcel of woody ground situate in *Heaton*, and at the time of making the indenture after set forth mentioned as being in the possession of *Jasper Pickard*; and that before the said times when, &c. viz. on the 13th of *July 1747*, one *Robert Stansfield*, was seised in fee of the *locus in quo*, and one *Jeremy Marshall* was also seised of the parcel of woody ground adjoining thereto, and also of 35 acres of land in *Heaton* adjoining to the said parcel of woody ground; under which woody ground and other adjoining land of *J. M.* there then were divers veins of coal which he was desirous of winning and raising, &c. and of having the use and benefit of a sough for himself, his heirs and assigns, to be made and carried up as after mentioned, for the purpose of draining the mines and works under the same, and thereby enabling him and them the better and more conveniently to dig and raise the said coal. That *Marshall* applied to *Stansfield* to grant to him for the purpose aforesaid the liberties and privileges mentioned in the indenture after set forth; and thereupon, by indenture of the 13th of *July 1747*, (since lost by time and accident) *Stansfield* granted to *Marshall*, his heirs and assigns, full liberty for him, *Marshall*, his heirs and assigns, to carry up a sough from the bottom or edge of the hill near the brook in the *locus in quo*, in the said indenture called a parcel of woody ground in *Heaton*, &c. into the said parcel of woody ground of *J. M.* in *Heaton*, aforesaid, in the possession of *Jasper Pickard*; which said two several parcels of woody ground are in the said indenture mentioned to adjoin upon and lie contiguous to one another; and also full liberty for *J. M.*, his heirs and assigns, to make two little sough-pits in the said parcel of woody ground of him *R. S.* near the edge of the hill or brook there, for the more easy and safe carrying up the tail of the said sough; one of the said sough pits to be covered from the top of the said intended sough to the surface of the ground as soon as conveniently might be done after the making thereof, and the other to be kept open for examining the sough so long as was necessary for that purpose, and no longer; and also full liberty for *J. M.* his heirs and assigns to get stones in *Stansfield's* woody ground for making the intended sough, and for making and repairing such part of the fence or walls belonging to *Stansfield's*

woody ground as should be injured by *J. M.* his heirs or assigns. The plea then stated, that *J. Marshall*, by virtue of the said indenture, became seised of and entitled to the said liberties and privileges for the purpose aforesaid to him, his heirs and assigns, as to the said parcel of woody ground and the said other lands of *J. M.* belonging and appertaining. That *J. M.* afterwards carried up the sough, and made the two sough-pits, in manner aforesaid, and exercised the liberties and privileges so granted for the purpose aforesaid, as belonging and appertaining to his parcel of woody ground, &c. The defendant then by his plea deduced title to himself through several mesne conveyances from *J. Marshall* to *Marshall's* parcel of woody ground and his adjoining land. The plea then further alleged, that *all the said seams and veins of coal* at or before the several times when, &c. *were not won from within and under the same parcel of ground and the same other lands, nor was all the coal then got or raised therefrom*: and that the said sough had been from the time of the making and carrying up of the same used and enjoyed for the purpose aforesaid, &c. as belonging and appertaining; &c., and until and at the several times when, &c. continued to be useful, &c. And because the said sough at the several times when, &c. was ruinous and obstructed for want of repairing, opening, and cleansing thereof, the defendant justified the entering the *locus in quo* and making the said pit or hole, and opening and uncovering the sough, &c. *for the purpose of the needful and necessary repairing, opening and cleansing the sough for the uses and purposes in that behalf aforesaid.* The replication to the special plea set out the grant at large, which was of the 30th of July 1747, by which *Robert Stansfield*, in consideration of 42s.; and of the covenants therein contained, granted to *J. Marshall, his heirs and assigns*, full liberty for him the said *J. N., his heirs and assigns*, to carry up a sough, &c. (stating the liberty to carry up the sough, and to make the two little sough pits, one to be covered, &c. and the other to be kept open, &c. in the same terms as mentioned in the plea: and then follows what was omitted in the plea,) and also full liberty for *J. M., his heirs and assigns* to bring the rubbish which may arise in another sough-pit made, or intended to be made, in *Marshall's* parcel of woody ground, and throw it into a hollow place in *Stansfield's* parcel of woody ground, for the rendering more safe and commodious the cart-way which is intended to be made by *J. M.* for the inhabitants of *Shipley* and others through his own ground there *to and from the INTENDED COLLIERY*; and also liberty for *J. M., his heirs and assigns*, to get stones in *Stansfield's* parcel of woody ground, &c. (as in the plea mentioned.) Then followed covenants (omitted in the plea) that *J. M., his heirs or assigns*, should not damage the trees growing in *Stansfield's* parcel of woody ground; nor get any of *Stansfield's* coals, but what should arise in the drift of the said intended sough: and that it should be lawful for *Stansfield, his heirs and assigns, from time to time and at all times after*, to go down into any pit or pits of *Marshall, his heirs or assigns*, for the better discovering whether any coals of *Stansfield's* his heirs or assigns, should be gotten, save as aforesaid. And also that *Marshall his heirs and assigns*, should not only repair such part of the fence or walls of *Stansfield, his heirs or assigns*, as should be injured by *Marshall, his heirs or assigns*, but should also from time to time, and at all times make good, maintain, and secure that part of the fence or walling towards the banks of the said brook where the said rubbish was intended to be laid. The replication then stated, that after *Marshall* had carried up the sough and made the two sough-pits, as in the plea mentioned, and before the said times when, &c. viz. on 1st of January 1776, *it became and was no longer necessary to keep open either of the said sough-pits for the purpose of examining the said sough*, and thereupon the said sough-pits were afterwards and before the time when, &c. *respectively filled and covered up to the surface of the ground by and with the consent and approbation of the person then seised of and in the said parcel of woody ground, and the said other lands*

theretofore of *J. M.* with the appurtenances, and entitled to use and enjoy the said sough, &c., and have not since been kept open. To this there was a general demurrer and joinder.

Holroyd, in support of the demurrer, contended that the right of repairing the sough was incident to the grant of it; for that wherever a power was granted to one to make and use a thing in the soil of another, every thing necessary for the attainment and enjoyment of the grant passed also; and amongst others the liberty of entering on the grantor's soil for the purpose of repairing the thing: for which he cited at large 2 Roll. Abr. 567. M. pl. 1, 2, and 3, and 9 Ed. 4. 35. b. *Pomfret v. Ricraft*, 1 Saund. 323, and other cases there referred to; and *Shep. Touch.* 89.(a) And here he argued from the wording of the deed, the reason of the grant, and the relative situation of the lands of *Stansfield* and *Marshall*, that the grant of the privilege of using the sough, &c. was intended to enure so long as any coals remained to be gotten in any of *Marshall's* grounds adjoining to or communicating with his parcel of woody ground, and was not merely confined to the privilege of using it for the getting of coals under his woody ground: for that there was a reference throughout to *Marshall's heirs and assigns*, as regulating their enjoyment of the privilege; which shewed that a continuing grant was intended. That it was not merely a grant to him, his heirs and assigns, to do the act; but a grant to him, his heirs and assigns, that he, his heirs and assigns, might do so. That the words of a deed were to be taken most strongly against the grantor; and the whole deed construed so as best to effectuate the intent of the parties at the time according to their several estates and interests. *Shep. Touch.* 87, 8. That the right of repairing the sough, incident to the general grant giving liberty to make and use it, was not restrained by the special leave granted to make the two sough-pits; for the use of those was afterwards qualified.

Wood, contra, contended, first, that whatever incidents might follow a grant, which were absolutely necessary for the enjoyment of it: as in the instances mentioned in *Rolle*, where the grant is in general terms: yet it was competent to the owner of the land to limit the enjoyment of the grant by express provisions; and that here it was evident, by granting the liberty of making the sough, and the two little sough-pits which were to be closed after the present purpose was served, that the liberty was only meant to be granted once, to be used so long as the sough then made would serve the purpose, but not to be continued and renewed from time to time by making fresh sough-pits after the first were closed. For otherwise it was nugatory to grant special liberty to make two little sough-pits, one of which was for the special purpose of more easily making the sough, and which was to be covered in as soon as conveniently might be afterwards, and the other to be kept open so long only as was necessary for examining the sough, and no longer; if it had been intended that the grantee and his heirs might at all times make new sough-pits whenever it should be necessary. Secondly, he contended that the grant of the sough was to be confined to the liberty of getting coals from *Marshall's* woody ground; for it was to carry the sough up through *Stansfield's* ground into *Marshall's* woody ground, and not also into his adjoining lands: but the liberty claimed by the plea comprizes both; which cannot be justified. If it had been intended to grant so large a liberty, which would be likely to endure for ever after, some general words would have been added. If there be a grant of a way to a particular close, it will not justify the user of it to go to a close over and beyond the close mentioned. *Saunders v. Mose*, 1 Roll. Abr. 391; *Howell v. King*, (b) &c. [Lord *Ellenborough*, C. J. To be sure, the way is to be measured by the use mentioned in the grant;

(a) Page 85, of edit. of 1784.

(b) 1 Mod. 190. Vide these and other cases collected in 4 Vin. Abr. 514.

but here the grant does not state that the sough is to be for the use or purpose of *Marshall's* woody ground, but only that it is to be carried *into* that ground: and when he got the sough into his own ground, he did not want any grant to carry it through his own ground.]

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. now delivered judgment. After stating the pleadings as before set forth—

On the part of the defendant it has been contended, under the grant from *R. Stansfield* to *J. Marshall*, that he the defendant, as *Marshall's* assignee, has a right to do every thing necessary to keep the sough in repair, as being incident to the grant of the sough; and, if necessary, to open sough-pits, and uncover the sough in the plaintiff's ground from time to time, as often as repairs of the sough shall be required. For the plaintiff it has been insisted, that the liberty of opening sough-pits was granted but *for once*, and not *as often* as the sough should require repairs. And, in addition to this question, another has been argued, viz. whether the defendant has, under the grant from *R. Stansfield*, any right to drain any land but that which was *J. Marshall's* woody ground. The deed granting to *Jeremy Marshall* the liberty of making the sough does not in any part of it distinctly point out what particular purpose the sough which was to be made was intended to answer: but as it appears from the deed that *Stansfield* was to have liberty to go down into *J. Marshall's* pits, to see that neither he, nor any claiming under him, got any coal under the plaintiff's close, except in the drift of the sough; as there are coals under *Marshall's* woody ground and the adjoining land; and as the deed speaks of an *intended colliery*; it seems that the object of the grant was to drain the water from such *intended colliery*, the local extent and limits of which intended colliery we have no means of defining: but judging from the nature of such works, there seems no reason to give them any other or narrower limit than the boundaries of the continued property of the grantee, under which the intended colliery might be prosecuted by him, without regard to the closes and pieces of ground under which it might be carried, and who might of course be expected to follow the coal through all the contiguous and connected veins and seams of coal which belonged to him. The question, therefore, is, singly, whether under the terms of the grant, the grantee had a right to do that which from time to time might be wanted to repair the sough, so long as the original purpose, for which it was made, required it to be continued: or, whether, the sough having been *once* made, it was the intention of the parties, that the grantee should use it no longer than it should happen to continue unimpaired by length of time or accidents; although in consequence of accidents the grantee might have actually lost the beneficial use of it very soon after it was made. Such latter construction, it is obvious, would but ill accord with the views of one who was about to open a *colliery intended to be worked as long as the coal might last*. As to the liberty of making two little sough pits, which were to be kept open during a certain time, and then to be filled up, (and which has been observed upon in order to shew that the defendant could not open pits for the purpose of repairing the sough:) this does not furnish any substantial inference against the defendant. The purpose for which that liberty was granted was "*the more easy and safe carrying up the tail of the sough and examining it*." The purpose of carrying up the tail of the sough has long since been answered; and from the words, "*the more easy and safe carrying up the tail of the sough*," it may be reasonably concluded, that the sough might have been carried up, though not so easily and safely, without such pits; and if that be so, *Marshall*, under the words granting him the liberty to make the sough, would not have been entitled to make pits of that description: and therefore no inference arises from the mention of them that other pits should not be made, if the same should be, and to the extent only in which they should be, absolutely necessary for the purpose of repair. Nor

do the covenants in the deed, with respect to the repairs of the fences and other matters mentioned in them, furnish any argument to shew that *Marshall* and his assigns had not, as incident to his grant, a right to do what might properly be necessary to repair the sough: for they are covenants by which he bound himself to do, for the benefit of the grantor, certain things which had no connexion with the continuance of the sough, and to do which he would have been under no obligation without such covenants. And it would be very illogical to deduce a conclusion from the terms of a deed comprehending covenants, without which one of the parties could not have certain rights, and from their not expressly granting matters, which would pass as incidents without being mentioned at all, that such matters in the nature of incidents were intended not to be granted. It is therefore to be seen, as there is nothing to narrow the grant, whether the right to repair the sough, and of doing all necessary things for that purpose, do not pass as an incident to the grant of the liberty of making it. As to which, the authorities quoted by Mr. *Holroyd* are very strong, and that cited from 2 Roll. Abr. 567, is very like the present case. It appears from the year-book, 9 E. 4. 35, thus—*Choke*, in the course of an argument at the bar, put this case: "If a man grant to me to dig in his land and make a trench from such a fountain or spring to my place, so that I may put a pipe to carry the water to my place; if the pipe be afterwards stopped or broken, so that the water cannot issue out, I cannot dig the land to amend the pipe; for that was not granted to me: but if he had granted that I might dig and amend the pipe *toties quoties*, &c., then I should do it. And the law is the same if I prescribe to have such a conduit; it behoveth me to prescribe to scour and amend it, *toties quoties*, &c. or otherwise I cannot dig the land to empty it, &c. *Quod fuit negatum* in both the cases; for it was said by the Court, that it is incident to such a grant to scour and amend." The authority of this and the other cases was not disputed; but the case found in Rolle's Abr. and the year-book was said to be distinguishable from that now before us, as that was a continuing grant, to convey water at all times. Yet it was conceded in argument, if the sough had been to drain the water from *all the grantee's coals*, that he would have had a right to maintain the sough while there were any coals: and if that be so, as it is admitted by the pleadings, that *all the coals are not gotten from within* and under *Marshall's* woody grounds and the adjoining lands, which may be deemed the intended colliery; upon the grounds already considered the right to maintain the sough will of course continue. For these reasons we are of opinion that judgment should be for the defendant.

Judgment for the Defendant.

Lloyd v. Hooper.

7 East, 624. June 25, 1806.

One who was residing at an hotel in town, from the time of his arrest till he was served with notice of executing the writ of inquiry, was holden not entitled to more than eight days' notice in a town cause, though his general residence (his home) was above 40 miles from town.

A RULE was obtained for the plaintiff to shew cause why the writ of inquiry executed and all subsequent proceedings should not be set aside for irregularity. The question turned upon whether the defendant had received proper notice of executing the writ of inquiry? The venue was laid in *Middlesex*, and the defendant, whose general residence was at *Abergavenny* in *Monmouthshire*, and who was residing there when the first writ was sued out, was afterwards arrested at a hotel in *Piccadilly*, where he had been staying for near a month before: and upon the declaration being filed, he had four days' notice

to plead, which was served at the hotel, as were other intervening notices between that and the notice in question, without objection made. At length, interlocutory judgment having been obtained, notice was given on the 7th of *June* for executing the writ of inquiry on the 16th; and it was not till the 14th, that the want of proper notice was objected to; the defendant being seen at the same hotel on the 7th and 16th of *June*.

Park shewed cause; and referring to the stat. 14 Geo. 2. c. 17, which provides, that no cause shall be tried at the Sittings in *London*, &c. or *Westminster*, &c. where the defendant resides above 40 miles from the same, unless at least ten days' notice of trial be given; (which by the practice of the Court in these cases is 14 days;) said, that this had always been understood of a *bona fide* residence of the party in the country during the proceedings: though he admitted, according to *Brind v. Torris*, 2 Blac. 1205, that a casual residence of the party in town where he was arrested, and the laying the venue there, would not take away his right to the longer notice in the subsequent stages of proceeding when he was *bona fide* residing above 40 miles off. But here he resided all the time in town.

Comyn, contra, said, that the defendant's residence in town during these proceedings was merely casual, his only home being at *Abergavenny*, where he was when the writ was first sued out, and to which he was about to return: and that the statute, requiring the longer notice to be given where the party resides above 40 miles from town, must be understood of his place of *general* residence, his home, and not of an accidental residence as a guest at a hotel. That this seemed to be the only certain criterion for giving notice, and was to be collected from the cases of *Brind v. Torris*, *Kutiff v. Gascoigne*, cited in *Douglas v. Ray*, 4 Term Rep. 553, and *Spencer v. Smith*, 1 East, 688.

The Court were clearly of opinion that the defendant, though his general residence might be at *Abergavenny*, yet having resided in *London*, for aught appeared, from the time of his arrest till after he was served with the notice of executing the writ of inquiry, was only entitled, as one living in town, to the eight days' notice, which had been given. That the object of the statute in requiring the longer notice to be given to defendants residing above 40 miles from town was to secure to them the full benefit of the notice for eight days, part of which time would necessarily be consumed in its reaching him in the country, and in giving him time to communicate upon it with his agent in town: but here the defendant continued domiciled in *London* at the time of the notice served, which distinguished this from the cases referred to.

Rule discharged.(1)

(1) Vide *Rockfort v. Robertson*, 12 East, 427.



J U D G E S
OF THE
COURT OF KING'S BENCH,

DURING THE PERIOD OF THESE REPORTS.

EDWARD Lord ELLENBOROUGH, C. J.
Sir NASH GROSE, Knt.
Sir SOULDEN LAWRENCE, Knt.
Sir SIMON LE BLANC, Knt.

ATTORNIES—GENERAL.

Sir ARTHUR PIGGOTT, Knt.
Sir VICARY GIBBS, Knt.

SOLICITORS—GENERAL.

Sir SAMUEL ROMILLY, Knt.
Sir THOMAS PLUMER, Knt.



CASES

IN

MICHAELMAS TERM,

IN THE FORTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

Vicars v. Wilcocks.

8 East, 1. Nov. 6, 1806.

Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted : but the special damage must be a legal and natural consequence of the slander.

IN an action on the case for slander, the plaintiff declared, that whereas he was retained and employed by one *J. O.* as a journeyman for wages, the defendant knowing the premises, and maliciously intending to injure him, and to cause it to be believed by *J. O.* and others that the plaintiff had been guilty of unlawfully cutting the cordage of the defendant, and to prevent the plaintiff from continuing in the service and employ of *J. O.* and to cause him to be dismissed therefrom, and to impoverish him ; in a discourse with one *J. M.* concerning the plaintiff, and concerning certain flocking cord of the defendant alleged to have been before then cut, said that he, (the defendant) had last night some flocking cord cut into six yard lengths, but he knew who did it ; for it was *William Vicars* ; meaning that the plaintiff had unlawfully cut the said cord. And so it stated other like discourse with other third persons, imputing to the plaintiff that he had maliciously cut the defendant's cordage in his rope-yard. By reason whereof, the said *J. O.* believing the plaintiff to have been guilty of unlawfully cutting the said flocking cord, &c. discharged him from his service and employment and has always since refused to employ him : and also one *R. P.*, to whom the plaintiff applied to be employed after his discharge from *J. O.*, on account of the speaking and publishing the said slanderous words, and on no other account whatsoever, refused to receive the plaintiff into his service. And by reason of the premises the plaintiff has been and still is out of employ and damnified, &c.

It appeared at the trial before *Lawrence, J.* at *Stafford*, that the plaintiff had been retained by *J. O.* as a journeyman for a year at certain wages, and that before the expiration of the year his master had discharged him in consequence of the words spoken by the defendant. That the plaintiff afterwards applied to *R. P.* for employment, who refused to employ him, in consequence of the words, and because his former master had discharged him for the offence imputed to him. The plaintiff was thereupon nonsuited ; it being admitted that the words in themselves were not actionable without special damage ; and

the learned Judge being of opinion that the plaintiff having been retained by his master under a contract for a certain time then unexpired, it was not competent for the master to discharge him on account of the words spoken; but it was a mere wrongful act of the master, for which he was answerable in damages to the plaintiff; that the supposed special damage was the loss of those advantages which the plaintiff was entitled to under his contract with his master; which he could not in law be considered as having lost, as he still had a right to claim them of his master, who without a sufficient cause had refused to continue the plaintiff in his service. 2dly, With respect to the subsequent refusal of *R. P.* to employ the plaintiff, that it did not appear to be merely on account of the words spoken; but rather on account of his former master having discharged him in consequence of the accusation; without which he might not have regarded the words.

Jervis now moved to set aside the nonsuit, and urged that it was always deemed sufficient proof of special damage in these cases to shew that the injury arose in fact from the slander of the defendant, and it was not less a consequence of it because the act so induced was wrongful on the part of the master. He said, that he could find no case where such a distinction was laid down, and that the practice of *Nisi Prius* was understood to be otherwise. 2dly, That the refusal of *R. P.* to employ the plaintiff was clear of that objection; and that such refusal had proceeded upon the alleged cause of discharge by the first master, and not upon the bare act itself of discharge.

Lord ELLENBOROUGH, C. J. said, that the special damage must be the legal and natural consequence of the words spoken, otherwise it did not sustain the declaration: and here it was an illegal consequence; a mere wrongful act of the master; for which the defendant was no more answerable, than if, in consequence of the words, other persons had afterwards assembled and seised the plaintiff, and thrown him into a horsepond by way of punishment for his supposed transgression. And his Lordship asked whether any case could be mentioned of an action of this sort sustained by proof only of an injury sustained by the tortious act of a third person. Upon the second ground, *non liquet* that the refusal by *R. P.* to employ the plaintiff was in consequence of the words spoken, as it is alleged to be: there was at least a concurrent cause, the act of his former master in refusing to continue him in his employ; which was more likely to weigh with *R. P.* than the mere words themselves of the defendant.

The other Judges concurring,

Rule refused.

Allen v. Ormond.

8 East, 4. Nov. 7, 1806.

One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years. The *terminus ad quem* being laid to be a *public highway* is proved by evidence of a *public footway*, though such description of the *terminus* might have been had on special demurrer, as not being sufficiently certain.

IN case for obstructing the plaintiff's *private* right of way, the declaration stated that the plaintiff was seised of two gardens with the appurtenances in *W.*, and claimed for him a right of foot and horseway "from his said gardens, &c. unto, into, over, across, and along a close called *Crannels* in the said parish, unto and into a certain public king's *highway* in the parish aforesaid, and so back again," &c. It appeared at the trial before *Chambre, J.* at *Wells*, that the entire close called *Crannels* had previous to the year 1792 belonged to one *Spackman*, who then conveyed most of it to *Chantry* and *Hayes*, for the latter

of whom the plaintiff was trustee, for the purpose of building and laying out gardens; reserving by the same deed a foot and horse road set out in a map annexed to the deed, all round the extremity of the close; which road led as well over the parcel conveyed as over the part retained by *Spackman*. The two gardens mentioned in the declaration, together with a house belonging to *Hayes*, were taken out of the parcel so conveyed, and adjoined the road, which after passing by the gardens and over the part originally retained by *Spackman*, (on which latter the obstruction complained of was erected) led immediately to a public *footway* approaching the city of *Bath*, and, by a circuit, to a carriage road to the same place. It also appeared in evidence, that the foot and bridle road reserved to the purchasers in the conveyance from *Spackman* had for the last 12 years and upwards been constantly used by the public. The defendant was now in possession, through mesne conveyances, of the remainder of *Crannels*, which had been originally retained by *Spackman*, and had obstructed that part of the road granted which led over his own premises.

It was objected at the trial, amongst other things, 1st, that the general user of the road for so long a time by all the king's subjects having made it a common highway, the plaintiff's private right was merged in the public right; and that however he might still maintain an action of covenant against the grantor or those claiming under him, as upon a covenant running with the land, for obstructing him in the exercise of the private right of way granted to him; yet that in this form of action, where the plaintiff sues only as one of the king's subjects against a stranger, he could not complain of the nuisance, without shewing special damage. 2dly, That the *terminus ad quem* described in the pleadings being a public *highway* which is *nomen generalissimum*, and must be taken to be a highway for all purposes, was not proved by evidence of a common *footway* only. These and other objections being overruled at the trial, and a verdict with nominal damages taken for the plaintiff, were now again urged by *East* and *Gaselee*, upon a motion for a new trial. But

The Court said, with respect to the first objection, that where a party has a certain special right of way granted to him, he may rest upon that title, and need not resort to a general right, which may possibly be disputed by conflicting evidence; especially in a case, like the present, of a public right of way growing out of an occupation way. As to the second point, they held the *terminus ad quem* laid to be well enough proved by evidence of a public *footway*; for it was a public *highway* for *foot passengers*; (1) though such a description might be bad upon special demurrer, as not pointing out with sufficient certainty what sort of highway was meant. (a)

Rule refused.

(1) Vide *The King v. The Inhabitants of the County of Salop*, 13 East, 97.

(a) Vide *Rex v. The Inhabitants of Hatfield in Derbyshire*, M. 10 G. 2. B. R. Rep. Temp. Hardw. 315. Mr. Ford (MS.) reports the case thus: Indictment against the defendants for not repairing a highway described the way to be a certain common and ancient King's highway for all the King's subjects; and it was alleged to be so ruinous that the King's subjects cannot pass. And now, after a verdict for the King at *Dorset* assizes, *Dennison* in arrest of judgment moved, that as there were various sorts of highways, as horseways, footways and driftways, and the common form of indictments is to express the nature of the way; therefore this was ill. Sed *per curiam*; the bounds of the way, as to the length and breadth, are properly described; and as this is laid to be a highway for all the King's subjects, we must take it to be a way for all sorts of passengers and carriages; and to say it is a highway for all the King's subjects is a sufficient description of such a way: So judgment for the King.

But in *Alban v. Brounsall*, Yelv. 163, upon demurrer to a plea of a right of *passage*, the bar was adjudged ill, amongst other reasons, for this, that it was not shewn what manner of passage it was, whether on foot, or horse, or cartway: so that it was in the whole uncertain.

Miles v. Sheward.

8 East, 7. Nov. 10, 1806.

Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l.* and be a young horse; and then alleged a breach in both those respects; held sufficient; though the proof was not only of a promise that the second horse should be worth 80*l.* (which it was not) and be a young horse, but also of a warranty that it was sound and had never been in harness.

IN case, upon the warranty of a horse, the third count stated, that whereas the plaintiff had bought of the defendant, upon warranty of soundness, a certain horse for 80*l.* paid by the plaintiff to the defendant, but which horse was unsound, and was in consequence returned by the plaintiff to and accepted by the defendant; and thereupon the defendant, in consideration of the premises, promised the plaintiff that he would sell and deliver to him another horse, in lieu of the horse so returned for unsoundness, *which should be worth 80*l.* and should be a young horse*; the plaintiff averred that the defendant did sell and deliver to him another horse in lieu of the horse so returned, but that the defendant deceived and defrauded the plaintiff in this, that the last mentioned horse so delivered in lieu of the horse so returned, &c. at the time of the promise, &c. was not, nor at any time since has been worth 80*l.* but only 35*l.*: and the plaintiff further averred that the last mentioned horse, &c. was not a young but an aged horse. The proof at the trial, at the sittings at Westminster, was that when the defendant agreed to take back the first horse for unsoundness, and to deliver another in lieu of it, he told the plaintiff that the latter "was worth 80*l.*, *that he would warrant it sound*, and that it was a young horse, and *had never been in harness*." The horse, though young, was proved not to be worth 80*l.* It was objected that the evidence did not sustain the count; the plaintiff having omitted to state two branches of the warranty in the contract declared on; namely, the *soundness* of the second horse, and that it *had never been in harness*. But Lord Ellenborough considered it to be sufficient that the plaintiff had set out all the substantive and material parts of the contract, the breach of which he complained of; the parts omitted not qualifying in any manner the sense of those parts set out upon which the breaches were assigned. The plaintiff therefore recovered a verdict; which

Park now moved to set aside, and to enter a nonsuit, by leave; contending that any variation, however trivial, in setting forth a contract declared on, was fatal. *Per Buller, J.* in *King v. Pippet*, 1 Term Rep. 249, and in *Drewry v. Twiss*, 4 Term Rep. 560. And he also referred to *White v. Wilson*, 2 Bos. & Pull. 116, and to *Penny v. Porter*, 2 East, 2, which were decided on the same ground.

LORD ELLENBOROUGH, C. J. If any one substantive part of the warranty stated, not qualified by another part omitted, be proved not to be true, is not that a breach of the warranty sufficient to maintain an action, although there may be also other parts of the warranty broken, which the plaintiff may not think it worth his while to complain of? The doctrine contended for would go the length of saying, that in covenant, which is a contract under seal, all the covenants, though no breach of most of them be complained of, must nevertheless be set out, as forming one entire contract. The substantial part of the contract, of the breach of which the plaintiff complained, was, that the horse was not worth 80*l.*: this he proved: and whether or not it were sound, or had or had not ever been in harness, was quite immaterial to this purpose.

In *Penny v. Porter*, the alternative part of the contract, omitted to be stated, altered the whole nature of the contract; and the mode of executing it could not change the original contract itself.(1)

GROSE, J. concurred.

LAWRENCE, J. It is a very different thing whether the plaintiff state truly those parts of a contract, the breach of which he complains of, though other parts not material to the question be not stated; or whether he state any part of it untruly; for then it appears to be a different contract. That was the case of *Bristow v. Wright*.(a) There is an action against the sheriff for taking the goods of a tenant in execution, without satisfying the landlord for a year's rent then due, of which the sheriff had notice, the declaration in setting out the demise stated that the rent was reserved *quarterly*; which was not proved: and though it was unnecessary to state how the rent was reserved, if a year's rent were alleged to be due; yet the plaintiff having undertaken to state it, and stating it falsely, the variance was deemed fatal. So in *White v. Wilson*, the plaintiff declared upon a contract for wages upon a certain voyage from *London to Africa*, and from thence to the *West Indies*; but the proof was of a contract for a voyage from *London to Africa*, and from thence to the *West Indies or America*, and afterwards to *London*, &c. which was a contract for a different voyage than that declared on.(2)

LE BLANC, J. Where the plaintiff states the consideration for the promise of the defendant, he must state the whole consideration; for otherwise the contract is not truly stated.(3) But where he states *the consideration* truly, as, here, the re-delivery to the defendant of the first horse; and then states those parts of the defendant's promise, the breach of which he complains of, and states those truly; that is sufficient, without stating other parts of the promise irrelevant to the breach complained of.

Rule refused.

Young and Another v. Alexander Brander and Dunbar.

8 East, 10. Nov. 11, 1806.

Where the legal title to a ship remained for a month after the sale in the vendors upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15, yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them.

IN *assumpsit* for work and labour done, and materials provided by the plaintiffs at the request of the defendants, tried before Lord *Ellenborough*, C. J. at the sittings after *Michaelmas* term 1805, the plaintiffs had a verdict for 68*l.* 0*s.* 10*d.* subject to the opinion of the Court on the following case.

The plaintiffs are ship-builders. On the 10th of *June* 1803, the defendants became owners of the schooner *Rebecca*; and on the 26th of *May*, 1804, they by a bill of sale duly executed on that day, and reciting the certificate of registry, transferred the whole of their interest in the *Rebecca*, for a valuable consideration, to one *Thomas Brander*: and on the same day, an indorsement was duly made and attested on the original certificate of registry, according to the form prescribed by the statute 34 G. 3. c. 68, and delivered, together with

(1) Vide *Howell v. Richards*, 11 East, 633.

(a) See *Williamson v. Allison*, 2 East, 450. 2, where this case is commented upon.

(2) Vide *The United States v. Porter*, 3 Day, 283. *Jerome v. Whitney*, 7 Johns. 321.

(3) Vide *Leeds v. Burrows*, 12 East, 3. *Clark v. Gray & al.*, 6 East, 569, 570. 1 Chitty on Pleading, 296, 6.

Miles v. Sheward.

8 East, 7. Nov. 10, 1806.

Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l.* and be a young horse; and then alleged a breach in both those respects; held sufficient; though the proof was not only of a promise that the second horse should be worth 80*l.* (which it was not) and be a young horse, but also of a warranty that it was sound and had never been in harness.

IN case, upon the warranty of a horse, the third count stated, that whereas the plaintiff had bought of the defendant, upon warranty of soundness, a certain horse for 80*l.* paid by the plaintiff to the defendant, but which horse was unsound, and was in consequence returned by the plaintiff to and accepted by the defendant; and thereupon the defendant, in consideration of the premises, promised the plaintiff that he would sell and deliver to him *another horse*, in lieu of the horse so returned for unsoundness, *which should be worth 80*l.* and should be a young horse*; the plaintiff averred that the defendant did sell and deliver to him another horse in lieu of the horse so returned, but that the defendant deceived and defrauded the plaintiff in this, that the last mentioned horse so delivered in lieu of the horse so returned, &c. at the time of the promise, &c. was not, nor at any time since has been worth 80*l.* but only 35*l.*: and the plaintiff further averred that the last mentioned horse, &c. was not a young but an aged horse. The proof at the trial, at the sittings at Westminster, was that when the defendant agreed to take back the first horse for unsoundness, and to deliver another in lieu of it, he told the plaintiff that the latter "was worth 80*l.*, that he would warrant it sound, and that it was a young horse, and had never been in harness." The horse, though young, was proved not to be worth 80*l.* It was objected that the evidence did not sustain the count; the plaintiff having omitted to state two branches of the warranty in the contract declared on; namely, the *soundness* of the second horse, and that it *had never been in harness*. But Lord Ellenborough considered it to be sufficient that the plaintiff had set out all the substantive and material parts of the contract, the breach of which he complained of; the parts omitted not qualifying in any manner the sense of those parts set out upon which the breaches were assigned. The plaintiff therefore recovered a verdict; which

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LORD ELLENBOROUGH, C. J. If any one substantive part of the warranty stated, not qualified by another part omitted, be proved not to be true, is not that a breach of the warranty sufficient to maintain an action, although there may be also other parts of the warranty broken, which the plaintiff may not think it worth his while to complain of? The doctrine contended for would go the length of saying, that in covenant, which is a contract under seal, all the covenants, though no breach of most of them be complained of, must nevertheless be set out, as forming one entire contract. The substantial part of the contract, of the breach of which the plaintiff complained, was, that the horse was not worth 80*l.*: this he proved: and whether or not it were sound, or had or had not ever been in harness, was quite immaterial to this purpose.

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Rule refused.

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Where the legal title to a ship remained for a month after the sale in the vendors upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15, yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them.

IN *assumpsit* for work and labour done, and materials provided by the plaintiffs at the request of the defendants, tried before Lord *Ellenborough*, C. J. at the sittings after *Michaelmas* term 1805, the plaintiffs had a verdict for 68*l.* 0*s.* 10*d.* subject to the opinion of the Court on the following case.

The plaintiffs are ship-builders. On the 10th of *June* 1803, the defendants became owners of the schooner *Rebecca*; and on the 28th of *May*, 1804, they by a bill of sale duly executed on that day, and reciting the certificate of registry, transferred the whole of their interest in the *Rebecca*, for a valuable consideration, to one *Thomas Brander*: and on the same day, an indorsement was duly made and attested on the original certificate of registry, according to the form prescribed by the statute 34 G. 3. c. 68, and delivered, together with

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(3) Vide *Leeds v. Burrows*, 12 East, 3. *Clark v. Gray & al.*, 6 East, 569, 570. 1 Chitty on Pleading, 295, 6.

the bill of sale, to the purchaser, *Thomas Brander*; who, on the same day, took possession of the *Rebecca*, and from that time acted as sole owner: but he did not deliver a copy of the said indorsement to the persons authorized to make registry, and grant certificates of registry, until the 23d of *June*, 1804, on which day he obtained a new certificate of registry. The defendant's names remained on the registry at the Custom-house, as owners, (but it did not appear to be with their concurrence) until the 23d of *June*, 1804, when such new registry was made. On the 11th of *June*, 1804, the captain of the *Rebecca*, by order of *Thomas Brander*, took the *Rebecca* to the plaintiffs to be repaired for her outward voyage; who thereupon made the repairs, &c. which are the subject of this action, between the 11th and 19th of *June*, 1804; during which time the names of the defendants remained on the register at the Custom-house: and no notice was given by the defendants to the plaintiffs of the change in the ownership previously to the work being done. If the plaintiffs were entitled to recover in this action, the verdict was to stand; otherwise a nonsuit was to be entered.

Yates, for the plaintiff, contended that as the defendants continued the legal owners of the ship till after the time when the repairs were made, by reason of the requisites of the registry acts not having been complied with, and without which no property in the ship could pass from them to the vendee, they were consequently liable, as owners, for repairs ordered by the captain. It has been long settled, that the legal owners are liable for necessary repairs, whatever contract they may have entered into with the captain, unknown to the builder, that he should bear the burthen. *Rich v. Coe*, Cowp. 636; *Garnam v. Bennett*, 2 Stra. 816, and other cases, particularly *Westerdell v. Dale*, 7 Term Rep. 306. The question arose in the latter upon an ineffectual attempt to convey under the registry acts. Now here the stat. 34 Geo. 3. c. 68. s. 15, expressly requires that a copy of the indorsement of the transfer of property shall be delivered to the person authorized to make registry and grant certificates of registry, otherwise such sale or contract, &c. shall be utterly null and void to all intents and purposes whatsoever. He was proceeding to argue the point of ownership on the statute(a) when *Le Blanc*, J. said, that he supposed it would not be disputed on the other side that the requisites of the act had not been complied with at the time, and that the legal ownership still remained with the defendants, though they might have done every thing which they were to do in order to convey it to *Thomas Brander*: but still the question would be, whether they were chargeable with repairs ordered on account of another.

Lord ELLENBOROUGH, C. J. then said, that the case was too clear to require argument. It is true, that the requisites of the act have not been complied with; and it is true, that the owners of a ship are liable for repairs ordered *for them, or for their benefit by their master*: but it was never heard of, that, if a stranger ordered repairs for another's ship or carriage, the owner was liable for such repairs. Suppose a pirate ran away with a ship, would the owner be liable for repairs ordered by him? Now here the captain, by the order of *Thomas Brander*, the purchaser, who was a mere stranger to these defendants in point of law, directed the plaintiff to make the repairs: how then can the defendants, merely because they remained as owners upon the register, be liable for repairs ordered by the captain under the authority of a stranger to the defendants? This is very different from the case of *Westerdell v. Dale*; that was a case of partnership, and there was no plea in abatement: *Wharton*, who was the same as *Dale*, had ordered the repairs; and the case turned on the privity between those two. But here *Thomas Brander* ordered the repairs in his own right, and there was no privity of interest between him

(a) Vid. *Moss v. Chernock*, 2 East, 399. *Heath v. Hubbard*, 4 East, 110. *Blozam v. Hubbard*, 5 East, 407, and *Moss v. Mills*, 6 East, 144.

and the defendants. In that case the defendant's liability was pursuant to the credit actually given; here it would be contrary to the credit actually given to hold the defendants liable.(1)

Per Curiam,

Postea to the Defendants.

Scarlett was to have argued for the defendants.

George v. Lousley.

8 East, 13. Nov. 11, 1806.

Where an award is made after the time originally given to the arbitrators, but authority was also given to them to enlarge the time; an award within the enlarged time authorized is good upon the face of it, though it do not recite that the arbitrators did in fact enlarge the time: But the Court will not grant an attachment for the non-performance of the award without the verification of the fact. Where the costs of the cause, *and of the special jury*, are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each; otherwise the award is bad; (but the plaintiff in this instance agreed to abandon it for so much.) The award was also set aside for so much as the arbitrators, without authority, had directed to be paid for their own expences.

W. TAUNTON shewed cause against one rule for setting aside an award, and supported another rule for an attachment against the defendant for non-performance of the award. The submission enabled the arbitrators to enlarge the time for making the award: and one objection to the award was, that it appeared to have been made after the time originally limited for making it; and it was not stated on the face of the award that the arbitrators had enlarged the time, within which it was made. But this, he contended, was not necessary: for as where a power of appointment is given, it is sufficient for the party authorized to make the appointment, without stating the power, but the law will refer the execution of it to the power itself; so the arbitrators need not set out their authority; but it is enough, that having authority to enlarge the time, they did in fact make an award within the time to which their authority might extend: and no presumption will be made against that which is to be collected from the fact itself of making their award.

The Court were disposed to think that this was a sufficient answer to the objection, as arising upon the face of the award; and called on the other side to sustain their rule for setting it aside.

Another objection however was made to the award, namely, that "the costs of the cause, *and of the special "jury,"* as contradistinguished, were specifically left to the discretion of the arbitrators, and that the arbitrators had taken no notice of the latter in their award, which they were bound to do, it being specifically submitted to them; (a) the amount of which was 15 guineas; (though it was stated, that in fact the arbitrators had included that expence in their general estimate of the costs of the cause.) And further, that they had charged 96*l.* in the award for their own expences, for which they had no authority. As to the first of these, *Taunton* answered, that the arbitrators having a discretion given them as to the costs of the special jury, their silence on the subject could not be objected to by the defendant on the face of the award. 2dly, That the expences of the arbitrators were very reasonable under the circumstances of the case, and such as they were entitled to recover. But that, at any rate, the award would only be void for the excess of the 96*l.* and the 15 guineas for the special jury, which the plaintiff would give up; and it would be good for the rest.

Sir *V. Gibbs* and *Manley* contra, said that as their affidavits did not go so

(1) Vide *Wendover & al. v. Hogeboom & al.*, 7 Johns. 308. *Hussey v. Allen*, 6 Mass. Rep. 163.

(a) Vid. *Randall v. Randall*, 7 East, 61.

far as to allege that the time was not enlarged in point of fact, they could not contend that the award was bad upon the face of it, because it did not recite such enlargement of the time upon the face of it: but, on the other hand, as the affidavits in support of the award did not allege that the arbitrators had in fact enlarged the time before they made their award, the plaintiff was not entitled to make his rule absolute for an attachment.

Accordingly, the rule for setting aside the award (except for the excess of 96*l.*, the expences of the arbitrators, and of 15 guineas for the expence of the special jury) was discharged; as was also the rule for an attachment.

Harden v. Smith.

Schroeder v. The Same.

8 East, 16. Nov. 12, 1806.

The stat. 39 G. 3. c. 69. s. 137, gives to the *West India Dock Company* certain rates and duties for all goods imported from the *West Indies* which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes and other machines belonging thereto, and the land-waiter's fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such coo^{er}page as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks in order to carry them across the quay, and afterwards crane them into the lighters. But it seems that if the owner require any work to be done upon the goods *ultra* the mere *transitus* of them from the warehouse to the lighter, the Company are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the act.

THESE were actions for money had and received, money paid, &c. which were brought against the defendant, as Treasurer of the *West India Dock Company*, to recover back certain sums, which had been paid by the plaintiffs, (the purchasers of certain hogsheads of sugar before then imported from the *West Indies* into the port of London, and which had continued all the time in the company's warehouses, and for which all the importation rates and duties had been satisfied,) to the officers of the company for the wharfage, and shipping into lighters, sent into the docks by the plaintiffs for that purpose, the same hogsheads of sugar, part for home consumption, part for exportation. The company on the one hand contending, that they were only bound, in consideration of the rates and duties received upon importation of the goods to deliver the same free of further charge from their warehouses into inland carriages: the plaintiffs, on the other hand contending, that they had a right for the same compensation to receive the goods from the warehouses across the quays, and by means of the cranes thereon into their lighters, and so to remove them by water carriage, as well as to receive and remove them immediately from the company's warehouses by land carriage. It appeared in evidence at the trial before Lord *Ellenborough*, C. J. at *Guildhall* that there was more risk, labour, and expence in shipping goods into lighters from the company's warehouses, where goods of this description are required to be kept, than into carts, &c. for inland carriage; because in the latter case the hogsheads are at once craned from the warehouses over the outer wall of the dock into the carts prepared by the owners to receive them in the public street: whereas in the other case the hogsheads are first craned from the warehouses into trucks upon the quay, in which they are dragged across the quay

to the water's edge, there they are rearing in the cranes on the quay, and lowered into the lighters afloat in the dock along side of the quay. That more hands are required, and the damage to the company in case of any accident happening by the breaking of the tackling, much greater in this mode of delivery than in the other; because the lighter itself, and perhaps other goods in it, may be sunk and destroyed by the falling of so heavy a weight upon it. And all this additional labour must be performed by the company's servants, and the additional risk of accidents incurred by the company, inasmuch as for furthering and securing the general purposes of the act, none other than the company's servants are permitted to enter the dock gates for these purposes. That an extra charge had always been paid for these services at the old legal quays before the passing of the act, when the goods were carried across the quays again and shipped into lighters, which was considered as distinct from an order to deliver from the warehouse. That the labour and expence was still greater when the goods were intended for exportation than for home consumption; for in the former case there was the additional expence and trouble of weighing, and pitching and turning for cooerage, more of which latter was required for the purpose of exportation than was necessary for the mere removal of the goods into the owner's cart or lighter for the purpose of safe delivery into the owner's possession. It was admitted however, that extra cooerage for exportation had been always charged separately, and paid for accordingly.

The particular clause on which the question turned was s. 137. of stat. 39 Geo. 3. c. 69, which gives to the company certain rates on certain specified commodities, and other rates on all other unspecified goods "imported from the West Indies, which shall be landed, unshipped, or discharged from on board of any vessel entering into and using any of the docks," &c. to be paid "by the owners or consignees of such goods." "Which rates or duties shall be levied and collected as after expressed, and shall be accepted and taken for and in respect of the use and conveniency of the said docks, and the quays, wharfs, and cranes, and other machines which shall belong thereto, and the land waiter's fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such cooerage as the same may respectively want after being unshipped, and all rent for warehouse room, for such goods for 12 weeks in the said company's warehouses, and ALL CHARGES OF DELIVERING THE SAME FROM THE SAID WAREHOUSES." The principal question arose upon these latter words, whether they extended to a delivery mediately from the warehouses across the quay, and by means of a second crange into a lighter in the dock alongside of the quay; or were to be confined to an immediate delivery from the warehouses landwise into the possession of the owner: in other words, whether the company were entitled to charge a reasonable compensation for wharfage and shipping, (which was the charge complained of and sought to be recovered back by these actions), as for a new and uncompensated service dehors the act; or whether the same services were included under the compensation paid upon the importation of the goods for the several services enumerated in the above mentioned clause, including the charge of *delivering the goods from the warehouses*. Lord Ellenborough, C. J. having, upon a view of the general provisions and objects of the act adopted the latter construction, at the trial of the first cause at the sittings after Michaelmas term 1805, in consequence of which a verdict passed for the plaintiff; a rule nisi was obtained in Hilary term 1806, for setting aside the verdict and granting a new trial, in order to have the point re-considered: and similar verdict having afterwards been taken in the second cause, the like rule was granted in Easter term last.

In this term counsel were heard upon both rules; *Topping, Marryat*, and *Carr* for the plaintiffs, in support of the verdicts; and *Garrow*, Sir *V. Gibbs*,

and *East*, for the company, in support of the rules for new trials. The argument turned altogether on the general view and the wording of particular clauses of the several acts of parliament for the government of the company; viz. the 39 G. 3. c. 69. 42 G. 3. c. 113, and 43 G. 3. c. 132, as explanatory of the meaning of the clause s. 137. of the 39 G. 3. c. 69, more immediately in question; which directs that the rates or duties, payable by the owners or consignees of goods brought into the docks and liable to be warehoused, shall be accepted and taken for (amongst other services there enumerated) "*all charges of delivering the same from the said warehouses.*" And now, the Court having looked into the different clauses of the acts referred to,

Lord ELLENBOROUGH, C. J. delivered their judgment. The question in these cases turns on the construction of the 137th section of the stat. 34 Geo. 3. c. 69, and comes to this single point, whether the West India Dock Company be bound, for the compensation given them in that section, to deliver the goods, which must be imported and landed on their quays, *from their warehouses*, in any other way than that by which they may be removed by land carriage; or, whether the proprietor of the goods be not for that same compensation entitled to require that they shall be delivered to him in such a manner as that they may be removed by water, if he shall be disposed or have occasion so to remove them? Many sections of the act have been referred to, with a view of shewing from the separate and distinct mention which is therein made of warehouses, quays, and wharfs, and from the circumstance of their being different provisions as to each of them, that the legislature must have supposed that the warehouses, quays, and wharfs would not be so constructed as to enable the putting of goods into lighters directly from the warehouses themselves: and it has been also argued, from the greater degree of trouble and risk which must attend the removal of goods from the warehouses across the quays, and the putting them from thence into vessels, compared with that which is occasioned by the putting them immediately from the warehouses into carts; and also from the practice which obtained at the quays before the passing of the act in question; that the compensation provided in that section must be understood as extending to a delivery for land carriage only. But, it does not appear from any part of the act that the legislature had any particular construction of the quays or warehouses in its contemplation at the time; nor that it at all regarded the practice of the legal quays: for it gives no direction as to the one, nor at all refers to the other. It leaves it entirely to the discretion of the company to make their quays and warehouses in such way as in their judgment should be most likely to answer the purposes of their constitution as a company; and gives them a defined compensation for the advantages which the importer should receive, without any reference to what had been before paid elsewhere for similar benefits. The question therefore depends upon the mere legal construction of the 137th section of the act, by which the payment of the compensation to be received by the company for the conveniences of their dock, quays, and warehouses, is divided between the owners of the ship and of the goods. The owner of the ship is to pay a certain rate per ton for the use of the dock, for the expences of navigating, mooring, and managing the vessel, for the use of the dock for light ships, for unloading and unshipping her cargo. (i. e. for the labour employed, and conveniences afforded, for such unloading,) for the landing-waiter's fees, and the cooperage required in unloading. These matters the legislature considered as being expences to which the owners of the ship should be subjected; for by the clause in question they are directed to be paid by the master or the owner. For the goods, the owner or consignee was to pay according to certain rates specified in a table or list; and those rates are described as levied and taken for the use and conveniency of the docks, for the quays, wharfs, cranes and other machines, for land-waiters' fees on account of the goods *after being unshipped*, (which latter words must be confined to the land-waiters' fees, and

do not ride over the preceding matter; for they are repeated again after the mention of cooerage, and are not deferred to the conclusion of the sentence, which they naturally would have been if they had been meant as generally restrictive;) and for all charges of landing, wharfage, housing, and weighing, for cooerage, for warehouse-room and *all charges of delivering the same from the said warehouses*. Now, as the rates are to be taken in satisfaction of *all charges of delivering the goods from the warehouses*, if the use of the quays and cranes be necessary for the purpose of such delivery, no claim can be made on that account, though it should be admitted that several of the things specified will be satisfied by the use made of them in the importation and landing. If the goods be delivered into carts, it is not contended on the part of the defendant that any thing is to be paid for the cranes used in such delivery: and if the plaintiffs are entitled to have their goods delivered into a lighter, by parity of reasoning no compensation can be claimed for the use of the necessary machinery and of the quay employed and used on such occasion. This brings the question to the single point, whether the company can say they will adopt only one mode of delivery? Now it has been truly observed that the legislature must have been aware that much of the produce of the West Indies would be removed by water as well as by land, and delivered from the warehouses into lighters, as well as into carts; and, if it had intended that the compensation which it has given should be confined to a delivery for land-carriage only, one cannot but suppose that it would have so said. It has been argued that, as no mode is pointed out for delivery, the mode of delivery is left to the company, and that they may fix on that which they think best. But it rather seems, that the legislature meant the delivery to be made in all the ways in which, according to the nature of the subject matter, it could conveniently be, and had in fact usually been made. And it would be a violent construction of the act to hold that when goods under certain circumstances might be much more conveniently delivered in one way than another, that the legislature intended to invest the company with a right of refusing to deliver them in the most convenient way. It should rather in point of reason seem that the mode of delivery should be left to the election of the owner of the goods, whose interest is to be advanced by the delivery, and who must necessarily do the first act towards a delivery, by sending either a land or water carriage for them. As to the argument in favour of the defendant from the extraordinary labour and risk in delivering on board lighters, beyond what would be incurred by delivering for land carriage; that has no foundation; as it does not appear that the legislature looked particularly, much less solely, to the latter mode of delivery when the fixing of the compensation came under its consideration. If indeed that had appeared, it might have had some weight. And if we suppose the legislature to have adverted to the necessity of building the warehouses at some distance from the parts of the dock where lighters could come, it must in that case be presumed that in fixing the gross quantum of compensation the probability of such extra trouble and risk was adverted to as an ingredient in forming that calculation. It was admitted in the argument that a delivery *from* the warehouse did not necessarily mean a delivery *at* the warehouse, if a delivery at the quay should appear to have been intended. And such must have been intended unless the act, (and that too without any thing being said in it to narrow the modes of delivery,) is to be construed as giving a right to, and a compensation for, one mode of delivery only, when there existed at the same time another equally obvious one, and which would in many cases be much the most beneficial. The act must be construed by its words, that is, by what it has said, and not by the consideration of extrinsic matter, which it has not mentioned or adverted to: such as extraordinary trouble, risk, &c.

In giving this opinion it must not be understood that more is meant than that the owner of the goods is entitled to have such a complete delivery of

them made to him for the amount of compensation limited by the act, as may enable him to carry them away either by land or by water, at his election. It is not meant that any thing necessary for purposes beyond the mere act of safe delivery into the proper medium of conveyance by land or water can be claimed of the company; or that the owner of the goods has any right to have the period of their passage from the warehouse to his cart or lighter, when once begun, prolonged or interrupted for any other collateral or distinct purpose to be answered thereby; and that upon such purpose being answered, the company are bound to take them up again *de novo*, and to proceed with the conveyance of them to his lighter. Such a transaction does not appear to us, as at present advised, to fall within the provisions of this act of parliament; and we are desirous that no inference may be drawn from what is now said that the company may not in such case be entitled to ulterior compensation. It will however be time enough to decide upon such question when it shall hereafter arise. For the reasons already given we are of opinion that the plaintiffs in these cases are entitled to retain the verdicts they have obtained, and that of course the rules *nisi* for new trials must be discharged.

The King v. The Inhabitants of Cromford.

8 East, 25. Nov. 12, 1806.

Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract.

UPON appeal against an order of two justices removing *Mary Higton* from the township of *Wirksworth* to that of *Cromford*, in the county of *Derby*, the Sessions confirmed the order, subject to the opinion of the Court on this case.

The pauper's husband *Wm. Higton*, being settled at *Cromford*, went on the 1st of *May* 1796, being then 14 years of age, as an apprentice to *N. Kniveton* of *Wirksworth*, weaver, and continued to serve him as an apprentice for 5 years. The following indenture was executed by *N. K.*, the master, and *Job Higton*, the father of *William*, but not by *William Higton* himself. "This agreement made the 1st of *May* 1796, between *N. K.*, weaver, and *Job Higton*, miner; and the said *N. K.* shall teach or cause to be taught *Wm. Higton*, the son of *Job Higton*, the art and mystery of weaving, &c. in the best way he can, for 5 years from the date above; and that *N. K.* shall find *W. H.* all utensils belonging to the said business; and that *W. H.* shall receive of *N. K.* half of what he earns, and the remainder to *N. K.*: to which we have interchangeably set our hand and seal, the date above written. (Signed and sealed by *N. Kniveton* and *Job Higton*.)" *Wm. Higton* did not execute or become a party to any other indenture.

Clarke was to have argued in support of the order of Sessions; and *Balguy*, jun. against it: but upon the first opening of the case, after the latter had referred to 4 Com. Dig. 80, tit. Justices of Peace, B. 55, that by the common law a man may be bound apprentice by his parents before his full age:

Lord ELLENBOROUGH, C. J. said, Here is neither a binding of the son himself apprentice, nor, if I may so say, of his parent for him: for there is no contract for his serving his master; nothing to bind the son to serve. He might serve in fact, but was under no obligation to do so: he only continued to be taught as long as he pleased, but was not obliged to stay. This was no apprenticeship.

The other Judges concurred; and *Laurence*, J. asked how any action could have been brought against any person for harbouring the boy as an apprentice: or how he himself could have been proceeded against under any of the statutes for regulating apprentices?(1)

Order confirmed.

Ex parte Bruce.

8 East, 27. Nov. 12, 1806.

Where application had been made for the discharge of an impressed seaman before the two years of his protection by the stat. 13 Geo. 2. c. 17, were expired, which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the Court granted a writ of *habeas corpus* for the purpose of liberating him, though the two years were now expired.

SIR V. GIBBS moved for a writ of *habeas corpus* to bring up an impressed seaman for the purpose of his being liberated. *Bruce* first went to sea in the merchant service on the 15th of *July* 1804, and was impressed on the 16th of *April* 1806, before the expiration of the two years during which all new seamen are exempted from the impress service by the stat. 13 G. 2. c. 17. s. 2. His brother had applied for his discharge to the Ld. C. Justice on the 18th of *June* 1806; but the affidavit on which that application was made only stating that *Bruce* had first gone to sea about the 15th of *July* 1804, it was thought not sufficiently certain that the two years were not expired at the time of the application. The fact however being now verified as above, and the argument pressed, that, unless relief could still be obtained, the temporary protection meant to be given by the legislature might often be violated for want of the means of applying in time;

LORD ELLENBOROUGH, C. J. said, that as an application for the party's discharge had been made in time, before the two years expired, although from some ambiguity in the mode of expression in the affidavit then produced it was not effectual; yet the doubt being removed, he should have his writ, though the time of protection was now expired.

Per Curiam,

Writ granted.

Clark v. Askew.

8 East, 28. Nov. 13, 1806.

The Court of Requests act for *Southwark*, &c. enacts that "if in any action, &c. for recovery of any debt sued against any person (within the jurisdiction) in any of the king's courts at *Westminster*, &c. it shall appear to the Judge, &c. that the debt to be recovered by the plaintiff doth not amount to 40s., &c. the plaintiff shall pay the defendant costs, &c. held that where the plaintiff's witness proved that the debt which was originally above, was reduced below 40s. by part payment before the action brought, the case was within the statute.

THIS was a rule on the plaintiff to shew cause why he should not bring the postea into court and file the plea roll, so that the defendant may enter a suggestion thereon, that the damages recovered do not amount to 40s., and that the defendant at the time of the commencement of this action was an inhabitant and resided within the jurisdiction of, and liable to be summoned to, the *Southwark* Court of Requests: and why the plaintiff should not pay the defendant his costs to be taxed, &c., pursuant to the stat. 22 Geo. 2. c. 47. The 6th sect. of that statute enacts, "that if in any action of debt, &c. sued against any person aforesaid (i. e. within the jurisdiction) in any of the King's courts at *Westminster*, &c. it shall appear to the Judge, &c. that the

(1) Vide *Matter of Mc Dowles*, 8 Johns. 328.

"*debt to be recovered by the plaintiff in such action doth not amount to 40s.;*" and the defendant shall prove himself residing, &c. within the jurisdiction, the plaintiff shall pay the defendant costs, &c. The affidavit of the defendant, besides verifying his residence, and that the debt arose within the jurisdiction, also stated that the plaintiff, at the sittings after *Trinity* term at *Westminster*, obtained a verdict for 11. 19s. 6d. And it also appeared by the evidence of the only witness examined for the plaintiff at the trial, that the plaintiff's original demand which arose upon a promissory note, was 8l.; and that the defendant had paid 6l. 0s. 6d., on account before the action brought.

Andrews shewed cause, and cited *M'Collam v. Carr*, 1 Bos. and Pull. 223, where *Ld. C. J. Eyre*, upon the construction of the *Middlesex* court of conscience act 23 Geo. 2. c. 33, considered that no case would be within it where the original debt, being above 40s., was reduced below that sum by a balance of accounts; because, as he said, the most intricate accounts between merchant and merchant might by that means come to be decided before a county court.

Sir V. Gibbs, in support of the rule, distinguished this from the case where the plaintiff's demand is reduced below 40s. by means of a set-off arising upon a different account: because the plaintiff's debt is still above 40s., and till pleaded it is uncertain whether the defendant will avail himself of his set-off; and if the plaintiff only brought his action for the balance, the defendant not availing himself of his set-off, the plaintiff would be concluded. But here the plaintiff's debt was reduced below 40s., by actual payments on account, before the action brought.

The Court, though they considered that the construction contended for by the plaintiff pressed hard against the words of the act, yet thought at first that the case was governed in principle by the former decision; but they desired to hear read the words of the *Middlesex* act, on which that construction was put, to see how far they corresponded with the *Southwark* act. And it appearing that the *Middlesex* act 23 Geo. 2. c. 33. s. 19, enacts "that in case any action of debt or *assumpsit* shall be commenced in any of the King's courts at *Westminster*, and the defendant shall live, &c. in *Middlesex*, and the jury upon the trial of such cause shall find the damages for the plaintiff under the value of 40s.; unless the Judge shall in open court certify on the back of the record, that the freehold, &c. or any act of bankruptcy principally came in question, &c. the defendant shall recover double costs:"

Lord ELLENBOROUGH, C. J. intimated a strong suspicion that the attention of *Ld. C. J. Eyre* in the case referred to had not been called particularly to the words of that act, which seemed hardly capable of receiving the construction which had been put upon them; for they are peremptory, that the defendant shall recover his costs in case the jury upon the trial of the cause shall find damages for the plaintiff under 40s., unless the Judge shall certify specially in certain cases, of which the case before the court was not one. The authority then of that opinion being out of the question, the facts here are brought directly within the words of the *Southwark* act; for it appeared upon the plaintiff's own shewing at the trial that his debt was under 40s. before the action commenced.

The other Judges concurring,

Rule absolute.

The King v. Valentine Jones.

8 East, 31. Nov. 15, 1806.

A defendant indicted here for misdemeanors committed by him in the West Indies in a public capacity under st. 42 G. 3. c. 85, is not entitled under that statute upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of *mandamus* to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the court of B. R.; but he must lay before the court such special grounds by affidavit as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of *mandamus* for the like purpose.

THE stat. 42 Geo. 3. c. 85, enacts (s. 1.) that any person employed in the King's service in any civil or military capacity, &c. out of *Great Britain*, guilty of any offence in the execution, or under colour, or in the exercise of any such capacity, &c. may be prosecuted in the Court of King's Bench in *England*, either upon information by the Attorney-General or indictment. And by s. 2, in case of such indictment found or information exhibited, the Court of K. B. may, on motion on behalf of the Attorney-General or other prosecutor, or of the defendant, *award at its discretion* writs of *mandamus* to any chief Justice and Judges, &c. or any court of Judicature in the country or island, or near to the place where the offence shall be charged to have been committed, or to any governor, &c. or to any other person or persons residing there, as to the Court of K. B. may, under all the circumstances of the case, seem most expedient. And the persons to whom the writ is directed are authorized to take the examinations of witnesses in writing touching the matters charged in the indictment or information, and transmit the same to the Court of K. B.; which examinations shall be allowed to be read as evidence on the trial.

This being the first case of a procedure under this act, to which the attention of the Court was called, it may be useful to report the course which was pursued. On a former day in the term, the defendant, against whom an indictment had been found by a *Middlesex* grand jury on the 25th of June last, charging him with breaches of duty in his capacity of commissary general of stores, provisions, and forage to his Majesty's forces in the *Caribbee Islands*, &c. in 1796 and 1797, obtained a rule calling upon the prosecutor to shew cause "why several writs of *mandamus* should not issue, directed to the Chief Justice and Judges of the Courts of (a) — for the several islands of *Barbadoes*, *Granada*, and *Dominica*, in the *West Indies*, respectively requiring them to hold courts with all convenient speed for examination of witnesses and receiving other proofs concerning the matters charged in the indictment in this prosecution: and in the mean time, to cause such public notice to be given of the holding of the said courts respectively, and to issue such summons or other process, as may be requisite for the attendance of witnesses, and to adjourn from time to time as occasion may require, pursuant to the stat. 42 Geo. 3, for the trying and punishing in *G. B.* persons holding public employments, for offences committed abroad, and to perform all such other matters and things as by the said statute is required; and why the examination and proofs to be thereupon taken should not be transmitted by some person or persons coming from the said islands respectively, and to be delivered upon oath, in such form as this Court should direct, to *H. D.* and *H. B.*, the clerks in court of this Court, or one of them, in the Crown Office, for the safe custody thereof, and in order to their being read in evidence on the trial of the issue joined in this prosecution, or any other subsequent proceedings

(a) The proper description of these courts was afterwards supplied.

thereon or relating thereto; and *why the trial should not be put off until the return of the said several writs of mandamus*; upon notice of this rule to the attorney or agent of the prosecutor in the mean time."

This rule was obtained upon an affidavit of the defendant, which, after stating generally that an indictment had been found against him, charging him with breach of duty in his capacity of commissary general of stores, &c. in 1796 and 1797, (as before mentioned) concluded, in the common form of an affidavit for putting off a trial on account of the absence of a material witness, that certain persons (by name) and several other persons were now in the *West Indies*; and that *he was advised and believed* that their evidence would be *material* for him upon the trial. And on the day given for shewing cause,

The Attorney-General, for the crown, said, that he thought it his duty to state the circumstances under which the application was made to the Court, not with a view of opposing it, if the Court in the exercise of the discretion vested in them by the act thought it proper to be granted; but rather to call their attention to it, that it might not pass as a matter of course. For this purpose, after advertg to the object of the statute, he stated the rule, and the affidavit on which it had been obtained: in doing which the attention of the Court was called to the generality of the defendant's affidavit for putting off the trial till the return of the writs prayed for: and Lord *Ellenborough*, C. J. intimated his opinion, that the affidavit was not sufficiently full for the purpose; omitting, as it did, to shew in what respect the evidence of the witnesses, (some of which he also observed were not named,) was material. The act of parliament, he said, required the Court to exercise their *discretion* upon the subject of awarding any writ of *mandamus* under it; and therefore called upon the party applying for such writ to lay before the Court some materials on which to exercise that *discretion*. In common cases where application was made to put off the trial, if nothing appeared to induce a suspicion that the application was made for delay, the Court were satisfied with an affidavit in the common form, for postponing the trial upon the absence of a material witness from one sittings or assizes to the next, because little inconvenience comparatively was likely to arise from a short delay: but here from the very nature of the proceeding much longer delay must intervene; and this too in a criminal case, which it was more necessary to watch over, from the temptation to offenders to gain time.

Park, in support of the rule, said that the affidavit was in the same form as in *Picton's* case, the only other instance of a proceeding under the act in question; and similar to the form of affidavits for the like purpose, to obtain depositions in the *East Indies* under the stat. 24 Geo. 3. c. 25.

LAWRENCE, J. Where justice is to be delayed so long, as in these cases it must be when the trial is postponed till the return of the writs of *mandamus*, the Court ought to have some special grounds laid before them to induce a probability at least that the evidence sought to be obtained may be material. Such appears to have been the intention of the act: and I see no difficulty in the defendant's doing so. It is not required of him to state his evidence, but only the nature of it: otherwise, under this general form of affidavit, he may delay the trial merely to get depositions of witnesses to his character. But it is the constant practice at the *Old Bayley* not to put off trials for the absence of witnesses to character only, on account of the facility of making such applications in delay of justice.

Park then said, that if the court required an affidavit from the defendant, that the application was not made for the purpose of delay, such an affidavit might be obtained: but it could not be expected of a defendant to disclose his defence before the trial. And in the interpretation of the statute some consideration ought to be had to the difficulty thrown upon the defendant of preparing for his defence at so great a distance from the place where the offence

charged was committed, and where most of the witnesses to the transaction reside.

Lord ELLENBOROUGH, C. J. observed, that the Court would not be satisfied merely with a general affidavit that the application was not made for delay; but that they should expect materials to be laid before them to enable them to say, exercising their judgment upon fair and probable grounds, that the evidence sought to be obtained was in its nature material.

The case stood over for a few days. And now another affidavit of the defendant was produced, stating in substance that the indictment was found on the 25th of *June* last, to which he had pleaded without delay. That certain persons (naming them) were acquainted with several of the dealings and transactions which took place between the defendant and *Matthew Higgins* in the indictment mentioned in the *West Indies* in 1796 and 1797, relating to the supplying the vessels, stores and provisions, &c. in the indictment mentioned. And that amongst the other witnesses, referred to but not named in the defendant's first affidavit, resident in *Barbadoes*, &c. or some of the other Leeward Islands, whose evidence he was advised and believed would be material for him on the trial, was *W. W.*, who he believed was now resident in *Barbadoes*; and who during the years 1796 and 1797 was the clerk and book-keeper of the said *M. Higgins*, at head quarters; and who kept and settled many accounts between the said *M. H.* and the defendant, respecting the vessels, stores, &c. supplied by *M. H.* for the use of the *British* army; and on the departure of *M. H.* was left as his attorney, and as such had other dealings on the same account with the defendant, and received payments on account. And it concluded with stating that the application was not for delay, but to obtain evidence, which the defendant was advised and believed to be material.

The Attorney-General, after stating the above, which he seemed to think satisfactory, adverted to the form of the rule, which he proposed to amend by inserting the proper stiles of the Courts in the several islands, to which the respective writs of *mandamus* were to go: and that to *Barbadoes* was proposed to be directed to the governor or eldest member of the council for the time being. He also prayed for other writs of *mandamus* as of course, on the part of the prosecution: stating that it was impossible for him to produce any affidavit as to the witnesses names or the objects of their examination, as those must depend upon the nature of the examinations taken by the defendant; some of whose witnesses were not even named.

Lord ELLENBOROUGH, C. J. said, that the application just made by Mr. Attorney-General on the part of the crown was of course to be granted, without requiring an affidavit; as the necessity of it was apparent upon the face of the proceedings. And with respect to the application made by the defendant, there was now a satisfactory affidavit to induce the Court to exercise their discretion in issuing the writs required. But, he added, that it must not be understood that the Court, in requiring such an affidavit had departed from ancient usage, and introduced a new rule: for in the case of *The King v. Le Chavelier D'Eon*, 3 Burr. 1513, upon an application to put off the trial upon an affidavit of the absence of material witnesses, in the common form, it was, after a full hearing, rejected by the Court; who said, that an affidavit in the common form might be sufficient where no cause of suspicion appeared to the Court: but that where a suspicion arose from the nature of the question, the Court would examine into the ground upon which the delay was asked, and had in criminal as well as civil cases refused to put off a trial; in such a case, it was not sufficient to swear in the common form, that the witnesses were *material*, but the Court would require a special affidavit to satisfy them that the persons were material witnesses, before the trial was put off on account of their absence.

The Court now directed the issuing of the several writs of *mandamus* prayed for on the part of the defendant, and of the crown.

Johnson v. Hodgson and Others.

8 East, 38. Nov. 18, 1806.

An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the *surveyors of the highways and their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being.

TRESPASS for breaking and entering a certain close of the plaintiff at *Bridlington*, in the county of *York*, and depasturing and taking the herbage there. The defendant justified under an act passed in the 8th of Geo. 3, for dividing and inclosing the open fields and commons in *Bridlington*, and for extinguishing the right of common on certain ancient inclosures there; whereby it was enacted, that all the said open fields and commons should be divided and allotted by certain commissioners; and that it should be lawful for them to *assign and allot* such parcels of land in *Bridlington Moor*, &c. as they should adjudge most convenient for digging and getting gravel or other materials for the repairs of the roads in *B.* and for the common use of the inhabitants thereof, or for any other public and necessary purpose the commissioners should think proper for the convenience or utility of the township of *B.* and that *all the grass and herbage* upon the parcels set out, for getting materials for the repairs of the highways, &c. *should be and forever remain to and for the use and benefit of such persons as the commissioners should award, order, or appoint*: whose award, to be drawn up within 4 months after the allotments made, and to be signed and sealed by the commissioners, and enrolled, should express the quantity, &c. of each parcel *assigned and allotted* to every of the parties interested therein, and should contain such other orders, regulations, &c. as should be proper or necessary to be inserted therein, according to the tenor and true meaning of the said act: and that the several allotments and divisions, and all orders, &c. made in the award, should be binding and conclusive upon all the parties interested. The plea then averred, that the allotments were made, and an award drawn up by the commissioners, expressing the quantities allotted, &c. with their abutments and boundaries, and such other orders, &c. as were proper or necessary to be inserted therein, &c.: and that such award was engrossed, signed and sealed, and inrolled, &c.; by which award the commissioners awarded, allotted, assigned, and set out the *locus in quo*, for the purpose of digging for and getting stone and other materials for the repairs of the roads within *B.*: and after seven years from the date thereof, *they did assign and award the herbage of the same allotment* to THE SURVEYORS OF THE HIGHWAYS within the township of *Bridlington* and THEIR SUCCESSORS *for the time being*, and also the grass to be mown thereupon, in the mean time to be by them annually let and disposed of in aid of the highway tax within the township. The plea then stated, that at the end of the seven years, and before the trespass complained of, the defendants *Hodgson and Paul* and one *C. S.* being surveyors of the highways within *B.* did, by virtue of the said act and award, let the herbage of the *locus in quo* to *R. G.* for a year, under whom the defendants justify the entering and taking the grass and herbage during the said letting. To which there was a general demurrer and joinder.

Littledale, in support of the demurrer, argued that the assignment by the commissioners of the herbage to the surveyors of the highways and *their successors* for the time being was void in point of law, they not being a corporation, nor capable of taking by that description in perpetuity. The legislature

cannot be taken to have intended to give the commissioners a power of making any other sort of assignment than the law in general recognizes. The surveyors then to whom the assignment was first made would only take during their continuance in office, and certainly not longer than for their own lives; and it does not appear that these under whom title is made were the same.

LORD ELLENBOROUGH, C. J. If the act itself had directed the herbage to be taken by the surveyors of the highways for the time being, would it not have been binding upon all persons? And this is the same in effect; for the act empowers the commissioners to do that which itself might have done. The surveyors for the time being do not take by way of grant, but by way of parliamentary declaration designating the persons who are to take and enjoy the herbage. By analogy to a common law conveyance, the objection would be good; but here they claim under the act. That which has been done through the instrumentality of the arbitrators is the same as if directed specifically by the act; as if the award had been set out in the act. If they have allotted the herbage only, the lord of the manor in whom the fee of the soil is will be a trustee for the surveyors for the time being as to the herbage.

LE BLANC, J. The fee will remain where it was before the allotment.

Per Curiam,

Judgment for the Defendants.

Holroyd was to have argued for the defendants.

The King v. F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, W. Bacon, G. Sheriff, W. Wells, and J. Wellingham.

8 East, 41. Nov. 19, 1806.

1. It is no objection *on demurrer*, that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment.
2. The *St. Alban's* paving and regulating act, 44 G. 3, empowers five commissioners assembled at a public meeting holden by virtue of the statute, to do certain acts; amongst others, to deliver notices in writing to any inhabitant to abate nuisances and encroachments in the street before their houses; and, on failure, empowers the commissioners to abate them; and gives an appeal to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act:" held that an appeal lay against such notices in writing; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts.
3. Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer," it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards recoup themselves out of the fund in the treasurer's hands.
4. And an indictment against certain commissioners for a contempt of an order of sessions in not paying such costs, stating generally, that the party appealed to the sessions against such notice in writing under the hands of five commissioners acting in the execution of the statute, and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient; for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act.
5. But counts in the indictment stating an appeal against a notice in writing, signed by A. B. C. D. and E. five of the commissioners, and an order by the sessions that the commissioners acting under the statute, and being the respondents in the said appeal, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging service of the order on those five and others acting as commissioners, &c.; and then charging, that at a subsequent meeting held by virtue of the act, A. B. (omitting C.) D. and E. and also F. and G. commissioners, were present and acting, and formed a majority, a demand of the 10*l.* costs was made on those six, which they refused to pay;

and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it, were, on general demurrer, holden bad. And the offence being laid jointly against the several sets of defendants in each count, the court could not give judgment, on such an indictment, even against the *four* who were parties to the appeal, and on whom service of the order was alleged, there being no one count including those only.

THE indictment stated, that by an act of the 44 Geo. 3, for paving, lighting, and regulating, &c. the streets of the borough of *St. Alban's*, reciting that the streets were subject to various encroachments and nuisances, it was enacted that the mayor, aldermen, &c. of the borough and their assistants, and certain persons therein named (amongst whom were the defendants) should be commissioners for putting the act into execution; that they should meet for that purpose from time to time; that not less than five should constitute a meeting; but that any five or more assembled at a public meeting, &c. might execute the powers of the act, and "*that no act of the said commissioners should be valid unless done at some meeting to be held by virtue of the said act.*" And it was further enacted, that if any persons should think themselves aggrieved by any rate or assessment to be made, or other matter or thing to be done in pursuance of the said act, such persons might appeal to the quarter sessions for the borough within six months, &c. such appellants first giving 14 days notice in writing of appeal, &c. to the clerk or treasurer to the said commissioners, or one of them, *and within four days after such notice entering into recognizance before a justice of the peace, &c. with two sufficient sureties*, conditioned to try such appeal, and abide the order, and pay costs, &c. And that the justices at sessions should hear and finally determine the appeal in a summary way, and award costs, &c.; and their determination be conclusive, &c. The indictment then stated, that the defendants, *Kingston, Ellis, Wallis, Hart, J. N. Bacon, W. Bacon, Wells, and Wellingham*, named in the act, took on themselves the office and duty of commissioners for executing the act, &c.; and that *Robt. Russell* and (the other defendant) *G. Sheriff* were at the time assistants to the mayor, &c. and also took on themselves the office and duty of commissioners, &c. That *J. C. Gape*, clerk, being then resident within the borough, and the owner of a dwelling-house and premises there, and within the jurisdiction of the commissioners, did duly, and according to the directions of the act, on the 25th of *May 1805*, appeal to the justices of the peace at the general quarter sessions for the said borough next ensuing, &c. *against a certain requisition in writing and notice under the hands of the said F. Kingston, J. Ellis, R. Russell, J. Wallis, and W. Hart*, five of the said commissioners so acting in the execution of the said act, and dated the 20th of *May 1805*, *before then given to the said J. C. Gape*; and which said requisition or notice in writing was made, or *purported to be made*, under the powers to them given by the act, and against the order or orders in pursuance whereof such notice or requisition was or might have been given; and by which said requisition *J. C. Gape was required at his own costs and charges* within 7 days from the date, &c. to cause the projection or annoyance therein-after mentioned belonging to the house in his occupation in the borough to be removed, &c. i. e. he was required to remove the rails in the streets near his dwelling-house; and the commissioners thereby gave him notice that in case he neglected or refused so to do, they would cause the same to be done, and that the costs and charges thereof would be levied in the manner directed by the act. That *J. C. Gape gave 14 days notice in writing* of his intention to appeal, pursuant to the statute, to the clerk of the commissioners, and *did in all respects conform to the directions and regulations respecting the said appeal, as was by the said act required*. That at the borough sessions, &c. holden on the 19th *July 1805*, to which he had so given notice to appeal, the said appeal, *wherein the said J. C. Gape was appellant, and the commissioners acting under the said act were respondents*, was heard before the said court of

quarter sessions, &c. when that court allowed the appeal, and ordered that the order and requisition in writing before mentioned, dated the 20th of May 1805, and all orders, matters, and things whereon it was founded, or which had been done in pursuance thereof, should be quashed. And it was further ordered by the said Court, *that the commissioners acting under the said act of parliament, and being the respondents in the said appeal, on service of the said order of quarter sessions, &c. should pay to the said J. C. Gape 10l. for the costs of the said appeal.* That the said order of sessions was, on the 2d of April 1806, *duly served upon the said F. Kingston, J. Ellis, R. Russell, J. Wallis, and W. Hart, and others acting as commissioners in the execution of the said act, and they the said F. K., J. E., R. R., J. W., W. H., and the said commissioners, were required to pay the said costs so ordered.* That at a certain meeting, duly held by virtue of the said act of the said commissioners acting in execution of the said act, on 11th April 1806, the said *F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon*, did attend as such commissioners, and acted in the execution of the act; and that the said *F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon*, were the majority of the commissioners so assembled, and had full power and authority under the act to order that the said 10l. so ordered by the sessions, &c. to be paid to *J. C. Gape* should be paid to him, and were all requested to pay the said 10l. &c. *That the said F. Kingston, J. Ellis, J. Wallis, W. Hart, J. N. Bacon, and W. Bacon*, not regarding the said act, nor the said order of sessions, &c. did unlawfully, wilfully, and contemptuously neglect and refuse, and have hitherto neglected and refused to pay to the said *J. C. Gape*, or to order to be paid the said 10l. so ordered to be paid to him, &c. for the costs of the said appeal, &c. in contempt, &c. and against the peace, &c. The 2d count, which was in substance the same, charged the same persons. The third count charged *Kingston, Ellis, Wallis, Hart, J. N. Bacon, Wells and Sheriff*, as commissioners, &c.: and the 4th count charged *Ellis, Hart, Wells, J. N. Bacon, Wellingham, and W. Bacon*, commissioners, &c., with like offences, in refusing to pay the 10l. costs of appeal. These counts stated the same preliminary matters as the first: and, in answer to a question afterwards put by the Court to the defendant's counsel, were admitted to be open to the same sort of objection as finally prevailed against the first count. The defendants demurred generally to all the counts.

Wood, in support of the demurrers, objected, 1st, to the form of the indictment, that the offences charged in the several counts are against different defendants; which offences, being in their nature several and distinct, cannot properly be joined in the same indictment. The first and second counts charge six defendants, viz. *Kingston, Ellis, Wallis, Hart*, and the two *Bacons*, the two latter of whom were no parties to the appeal, omitting *Russell*, who was a party. The 3d count charges seven defendants, omitting *W. Bacon* before charged, and including *Wells* and *Sheriff*, new parties. The 4th count charges six defendants, including *Wellingham*, who was not mentioned before. This he argued was a misjoinder of counts against different sets of offenders, unprecedented, and tending to embarrass them in their defence; and not like charging the same defendants with different offences ejusdem generis in different counts. And that if the Court would have quashed the indictment on motion for this misjoinder, *a fortiori* they would do so on demurrer.

The Court, however, over-ruled the objection. And by

Lord ELLENBOROUGH, C. J. This would have been a good ground of application to the discretion of the Court to quash the indictment for the inconvenience which may arise at the trial from joining different counts against different offenders; but where to the offences so charged in different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law; nor is there

any legal incongruity on the face of it, to warrant us giving judgment for the defendants on demurrer.

LAWRENCE, J. Referred to several authorities to shew the legal congruity of such a joinder of counts; though he agreed that it was matter of discretion for the Court on motion to quash an indictment so framed. In 2 Roll. Rep. 345, the case is stated of an indictment against four persons for erecting four several inns, and selling victuals to travellers *ad commune nocumentum*: and it was quashed, because it was not alleged that they *separaliter* did the acts, and several acts are attributed to them jointly. *For though four for several offences may be indicted in the same indictment, it is as several indictments in law: and the form shall be separaliter exererunt.* And Lord Hale (2 Hale P. C. 174,) after giving some instances of indictments against several for separate acts of the same kind, which were quashed, refers to the same case which is reported in 2 Rol. as laying down the rule, that for several offences of the same nature several persons may be indicted in the same indictment; but then he says, it must be laid *separaliter*; for want of which word that indictment was quashed. And he adds that "it is in common experience at this day that 20 persons may be indicted for keeping disorderly houses, &c. and they are daily convict upon such indictments; for the word *separaliter* makes them several indictments."

The other Judges concurring to over-rule this objection; (a)

Wood proceeded to state other objections. 2dly, the appeal is given on condition only of giving 14 days notice to the clerk of the commissioners (which is averred to have been done) *and within 4 days after such notice entering into recognizance before a justice of peace, &c. with two sufficient sureties*, to try, &c.; of which performance is not specifically averred; and the want of such averment is not supplied by the general allegation that the prosecutor *did in all respects conform to the directions and regulations respecting the said appeal, as was by the said act required.* As in *Ladbroke v. James*, Willes' Rep. 199, an insolvent act having empowered the quarter sessions to discharge certain persons who had surrendered before a given time; it was holden, that in pleading a discharge by that Court, it was necessary to allege that the party was in prison, or had surrendered himself before that time; and that it was not enough to say that he was *duly* discharged by the Court, &c. (To this nothing was said at the time (b) by the Court.) 3dly, It is only stated, that a notice or requisition in writing was given to the prosecutor by five of the commissioners to remove the nuisance: but it is not alleged that such requisition was made, or any order given for the making it, at any *public meeting held under the act*; without which the requisition itself was purely void, and no appeal would lie against it. (To this it was answered by Lord Ellenborough, C. J. and Le Blanc, J. that the indictment alleged that the requisition was, or purported to be, made under the powers given to the commissioners by the act: and that as against them it was evidence that they were acting in their public capacity; and that the Court would intend that it was done by them when lawfully assembled.) 4thly, He contended that such a requisition in writing to remove a nuisance was not the subject of appeal, upon the true construction of the act, which was only given against the infliction of penalties to be levied before magistrates. But that as to the removal of nuisances, which may be done by order of the commissioners, if the parties upon such

(a) Vide 2 Hawk. c. 25. s. 89.

(b) At the conclusion of the case Lord Ellenborough seemed to think that the general allegation of conformity to the act was not sufficient to supply the want of a distinct averment that the appellant had, within 4 days after notice of appeal, entered into recognizance, &c. with two sufficient sureties: But *Espinasse*, for the prosecutor, stating that he meant to contend that that, being merely an inducement to the charge in the indictment, might be stated generally; and referring to *Wright's case*, 1 Vent. 170, and *Hart's case*, Cro. Jac. 473; Lord Ellenborough said, that without deciding that point, the other objection (which was afterwards lastly taken) was decisive.

notice will not themselves remove them, the act meant to vest an entire discretion in the commissioners, and not to transfer it from them to the quarter sessions; leaving the party to his remedy by action of trespass if they exceeded their jurisdiction. [To which Lord *Ellenborough*, C. J. and *Lawrence*, J. said that it was a more beneficial construction, even for the commissioners themselves, to give the appeal before the act, which might subject them to be treated as trespassers, was done: and the words of the act were sufficient for that purpose; giving the appeal (p. 26.) to any person aggrieved by any rate, &c. to be made, *or other matter or thing to be done in pursuance of this act*: (a) and it is hardly to be supposed that the legislature could have meant to give the commissioners a discretion, without appeal, to pull down part of a man's house, and leave him to his remedy by action of trespass: and in point of discretion the quarter sessions of the borough were as likely to be as good judges of local nuisances as the commissioners.] 5thly, He objected that the commissioners were not personally liable for the costs of appeal; but that the order of the sessions for the payment of the costs should have been carried to the treasurer; and that if he, having sufficient funds in his hands, had refused payment, he would have been indictable. In support of this objection he referred to various clauses of the act. (p. 7.) "The commissioners shall sue and besued in the name of the treasurer." (p. 10.) "No contract which shall be made by any of the commissioners for any of the purposes of this act shall be binding on them as individuals in their private capacities; nor shall any of them personally, or their respective estates, be answerable for or subject to the payment of the interest of monies, &c. And that all the money which shall be paid, expended by, or recovered against any of the *said commissioners, or their treasurer*, or any person employed by them, by means of any action, prosecution, proceeding at law, or *appeal* for any cause relating to this act, or any thing done by or under the authority of the same, shall be borne and defrayed out of the money which shall come to the hands of the treasurer to the said commissioners by virtue of this act." The indictment charges that the defendants, commissioners, neglected and refused *to pay, or to order to be paid*, the costs of appeal to the prosecutor: but no clause of the act requires them to pay or to make such order for payment; nor is it even stated, that there was any money in the hands of the treasurer out of which such payment could have been made: but this is an attempt to make the commissioners personally liable for the costs. (b)

Lord ELLENBOROUGH, C. J. There is nothing in the act to bar a recovery against the commissioners themselves in the first instance for the costs awarded against them. The principal clause referred to (p. 10.) speaks of money to be recovered *against the commissioners*; which assumes that they would be subject to such recovery. Though when the money is recovered against them, for acts done in their public capacity, they may recoup themselves out of the money in the hands of their treasurer.

Lawrence, J. According to the construction contended for, if, after notice to a party to abate a nuisance, he neglected to do so, and the commissioners thereupon directed it to be done, they would not be liable for the charges of the workmen, if there were no money in the hands of their treasurer. Suppose a recovery against the commissioners in an action of trespass for an act done by them in their public capacity; can it be contended that they would not be personally liable to execution upon the judgment for the damages and costs; however they might afterwards come upon the funds in the hands of their treasurer to reimburse themselves. There is nothing in the act to discharge the commissioners from being personally liable for their own acts.

Wood then objected, 6thly, that at any rate only the five commissioners,

(a) Vide *Bonnell v. Beighton*, 5 Term Rep. 187.

(b) See upon this point *Leader v. Moxton*, 3 Wils. 461, and 2 Blac. Rep. 924, and *The Governor and Co. of British Cast Plate Manufacturers v. Meredith*, 4 Term Rep. 794.

Kingston, Ellis, Russell, Wallis, and Hart who signed the requisition in writing, against which the appeal was made, would be liable personally for the costs; and there could not be judgment against the nine defendants for the acts of four of them, together with *Russell* the fifth not made a defendant, when each of the counts charges some other besides the four, and some of them are not stated to have been served with the order of sessions:

Espinasse, contra, was called upon by the Court to answer this last objection; and was asked if the charge were not vitious in every count in charging a service of the order on part only of those who were indicted for non-payment of it: and offering no answer to this, the court waived hearing any further discussion on other points of the case.

LORD ELLENBOROUGH, C. J. It is a decisive objection to the first count, that it charges a contempt by six persons of an order, which is only stated to have been served on *four* of them (for the fifth person, on whom it was served, is not included in the indictment.) There must be personal service of the order on all the persons who are charged with a contempt of it. A similar objection is admitted to run through all the counts.

GROSE, J. concurred.

LAWRENCE, J. The indictment is for a disobedience and contempt of an order of sessions, which order is only stated to have been served on five persons; those alone therefore could be guilty of a contempt of it: and yet the contempt is charged in every count upon others than those.

LE BLANC, J. The first count does not state that the six persons, whom it charges with the contempt of the order of sessions, had ever been served with it; but it only states service of the order on five persons by name, and others whom it does not name, four of whom named, omitting *Russell*, are included in the charge. This is attempted to be supplied by stating that at a meeting of the commissioners, at which those four and the two *Bacons* were present, a demand was made of the money on all the six, which they refused to pay, or to give an order for the payment of it: but it is no where alleged that the two *Bacons*, charged also in that count, had been served with the order. The same objection is admitted to apply to all the counts.

Judgment for the Defendants.

The King v. Bridges.

8 East, 53. Nov. 19, 1806.

One convicted upon the st. 9 & 10 W. 3. c. 41. s. 2, of having unlawfully in his possession, or concealing, the king's naval stores, cannot, since the stat. 39 & 40 G. 3. c. 89. s. 2, be sentenced to hard labour.

THE defendant was brought up for judgment, after conviction on the stat. 9 and 10 W. 3. c. 41. s. 2, for unlawfully having in his possession the king's naval stores marked with the king's mark: and judgment was about to be pronounced that he should be imprisoned in the house of correction for the county of *Surry*, and there kept to hard labour for 3 calendar months, and be once during that time publicly whipped. This would have been warranted by the statute 17 Geo. 2. c. 40. s. 10, reciting the st. 9 and 10 W. 3. c. 41, and 9 Geo. 1. c. 8. But a doubt occurring how far the power of sentencing to hard labour was taken away by the subsequent statute of the 39 and 40 Geo. 3. c. 99. s. 2, the Court, upon further consideration, and comparing the different provisions of these statutes, were of opinion, that the power of sentencing to hard labour was taken away by the latter statute; and therefore pronounced judgment, that the defendant should be imprisoned in the house of correction for the county of *Surry* for three calendar months, and be once during that time publicly whipped.

Irvine v. Elnon.

8 East, 54. Nov. 20, 1806.

After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award corresponding to the admitted proportions of a partnership fund.

AN umpire made his award within time; but in calculating the sum due to one partner, he miscalculated his share 2-3ds, in stead of 1-3d; and after delivery of the award, the error was pointed out to him; on which, within the time allowed by the terms of submission, he made a second award, correcting the error.

Garroo and *Marryat*, on shewing cause against a rule for setting aside the second award, cited *Henfree v. Bromley*, 6 East, 311, where Lord *Ellenborough* seemed to distinguish between a case like the present: where, as they contended, the alteration was merely intended to correct an error in the calculation of figures: and the case then before the Court; where the arbitrator, after having completed his award, and delivered it out of his hands, had attempted to exercise a new act of judgment as to the costs of the reference, which he had not meant to include in his original award. But

Lord ELLENBOROUGH, C. J. said, that what had been there observed by him was merely in answer to an argument urged at the bar: and that the result of his judgment then was, as it still continued to be, that the arbitrator's authority, having been once completely exercised pursuant to the terms of the reference, was at an end, and could not be revived again even for the purpose of correcting a mistaken calculation of figures; observing, at the same time, that such mistakes might include the essential merits of the case.(1)

The Court was thereupon prepared to make the rule absolute, when it was suggested to Sir V. Gibbs, whose rule it was, that the effect of making it absolute would be to set up the original award, which was admitted on all hands to be erroneous in this respect. To obviate the inconvenience, therefore, it was agreed that both the awards should be set aside.

Bell v. Saunderson.

8 East, 55. Nov. 20, 1806.

The insolvent debtor's act of the 41 G. 3. c. 70, only discharges the *person* and not the *effects* of the debtor, as appears by s. 38, giving the plea of discharge though s. 4, in the terms of it includes both, but with reference to the subsequent provision.

TO *assumpsit* for goods sold and delivered the defendant pleaded his discharge under the insolvent debtor's act of the 41 Geo. 3. c. 70, and the replication, admitting the discharge as to his person, prayed judgment against his goods, and the plaintiff obtained interlocutory judgment accordingly, and executed a writ of inquiry; and after final judgment (which by mistake was entered up generally) issued a writ of *fieri facias* and levied his damages. And now *Espinasse*, in support of a rule *nisi* obtained by him on a former day for setting aside the judgment and execution, for *irregularity*, insisted that the 4th section of the act discharged not only the *person* but the *effects* of the defendant; enacting that every person within the relief of the act "shall, as to his *person* and *effects* respectively, be for ever released, discharged, and exonerated to such extent and in such manner as is hereinafter provided, and no otherwise." But

(1) Vide *Oliver v. Collings*, 11 East, 367.

The Court held, that these latter words controuled the generality of the former; and as the only subsequent provision touching the discharge was in section 38, enabling defendants sued for existing debts to plead the statute in discharge of their *persons* alone from execution, that the interlocutory judgment was regular, and the execution such as was meant to be allowed by the act; though final judgment had been entered up generally by mistake. This, however, was no matter of *irregularity*; and therefore they discharged the rule which was obtained on that ground: but it was agreed to be referred to the master, to see whether more had been levied on the *feri facias* than was due, and the costs to be in his discretion.

Littledale for the plaintiff.

Sir F. Baring and Others v. Day.

8 East, 57. Nov. 21, 1806.

The commander of a stranded vessel having by the recommendation of the pilot who came to his assistance, sent to the defendant on shore, till then a stranger to him, to send all the help which was necessary, which he accordingly did: and under his direction (but also under the inspection of custom-house officers attending,) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs; and he paid all the salvors: held that this constituted him the agent of the owners, and took the case out of the stat. 12 Ann. st. 2. c. 18. s. 2, for regulating the quantum of salvage by the award of three justices of peace; which statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders.

IN trover for a cargo of sugar and cotton, tried before *Thompson, B.* at *Winchester*, a verdict was found for the plaintiffs, subject to the opinion of this Court on the following case. In *May* 1805, the ship *John* and *William* sailed from *Surinam* bound for *London*, with the cargo in question, consigned to the plaintiffs, merchants in *London*; and having in the course of her voyage met with bad weather and parted all her cables, she was on the 23d of *October* 1805, about half past two in the morning, stranded at *Sowley Beach*, near *Lymington*, in the county of *Southampton*. Between 7 and 8 o'clock on the same morning, two pilots went on board, at whose recommendation the mate of the ship, who then had the command of her, (the master having gone on shore at *Stokesay* the evening before,) sent for an anchor and cable to the defendant, who lived at *Cowes*, in the *Isle of Wight*, and who was then a stranger to the master and owners; but before the anchor and cable arrived, which was not till the 24th at day light, the tide had forced in the head of the ship, and she had fallen upon her side, and had five feet water in her hold. The anchor and cable were of no service when they arrived; and the situation of the ship becoming more urgent, the mate who still had the command of her, sent to the defendant to send all the help which was necessary; and he accordingly sent several small vessels with men to their assistance. But before any of the cargo was removed, (but whether before or after the arrival of any of these vessels was not exactly ascertained,) a custom-house officer from *Lymington* came on board, who was accompanied or followed by other custom-house officers, one or other of whom remained on board during the whole time that the cargo was unloading. And as the goods were carried off in the vessels furnished by the defendant, the mate of the ship and a custom-house officer took an account of them, and a custom-house officer went to and fro with each boat. The cargo was in this manner unshipped in about a week after the stranding, and was carried to *Cowes*, where it was lodged in the defendant's warehouses, under the joint locks of the defendant and of the collector of the customs of that port, as is always done when foreign goods subject to duties are brought into port, and also in the case of

wrecked and stranded goods. The custom-house fees and charges were paid by the defendant, including the demands of such of the custom-house officers as assisted at the wreck in saving and taking care of the goods, and of others of them who attended at the defendant's warehouses where they were stowed; all which payments were charged by the defendant in the account afterwards delivered in by him to the plaintiffs, and which account was afterwards submitted by the plaintiffs to the magistrates, and upon which they made their award, as after-mentioned. During the saving and stowing away of the goods, the defendant also, at the request of the master, advanced to him 300*l.* to pay seamen's wages; which sum of 300*l.* was soon after repaid by the master, and forms no part of the defendant's claim to retain in this action. The plaintiffs afterwards sent an authorized agent to *Cowes* to settle the amount of the salvage, and to re-ship the goods for the port of *London*, their original destination; having petitioned the board of customs for that purpose. The plaintiff's agent accordingly applied to the defendant for an account of the expences of the salvage; who delivered in a bill amounting to 1816*l.* 16*s.* 2*d.* (not including the 300*l.* before-mentioned to have been repaid to him,) with which the plaintiffs being dissatisfied, they refused to pay it, and signified to the defendant and to the collector of the customs their intention of applying to the magistrates to settle the amount of the salvage pursuant to the act of parliament. On the 24th of *October*, the master who had then heard of the disaster which had befallen the ship, went also to *Cowes* to the defendant, from whom he learnt what measures had been taken, which he approved; and soon afterwards went to the ship, where he found the persons whom the defendant had sent employed in getting out the cargo, of which they had the management; and he consulted with the defendant what was best to be done. The collector of the customs at *Cowes*, or any officer under his controul, did not go on board the ship; nor was the place where she was stranded within his district, but within the port of *Southampton*, of which port *Lymington* is a member. Early in *December* 1805, the defendant applied to the collector of the customs at *Cowes*, and inquired if he had any directions from the Board for the re-shipping of the cargo in question for the port of *London*; to which he answered, as the fact was, that he had received the leave of the Board conditionally, that the salvors should be first satisfied what they were entitled to have, and that the crown should be put to no expence on account of it. The defendant then said, that the owners refused to pay his demand, and wished to refer it to the adjudication of the magistrates, to which he would not consent. The collector said, that as the plaintiffs objected to the defendant's charges he, (the collector,) could not agree to them, and the matter must go to the adjudication of the neighbouring magistrates. And the collector also informed the plaintiffs' agent that till they could agree with the salvors, or the matter was settled by the magistrates, he could not suffer the plaintiffs to re-ship their goods. Soon after, upon the application of the plaintiffs, the collector nominated two neighbouring justices of the peace, and the plaintiffs a third, (of which notice was given to the defendant,) for the purpose of adjusting the quantum of the monies and gratuities to be paid to the defendant and the several other persons who had acted in the salvage of the said cargo. And the said justices afterwards appointed the 2d of *Jan.* 1806, for the hearing and adjudication of the said matters; of which the defendant had notice, but did not attend: whereupon the magistrates adjourned to a subsequent day, of which the defendant had also notice; and he not then attending, the magistrates examined the said matters, and every charge made by the defendant in his bill delivered, and heard the witnesses, and made their adjudication and award as follows: *Isle of Wight*, county of *Southampton*. Whereas in order to settle and adjust the quantum of monies or gratuities to be paid to the several persons who acted and were employed in saving and preserving the cargo and materials of the ship *John and William, J. P.* master, bound from *Surinam*

to *London*, laden, &c. stranded on *Sowley Beach*, between *Leap* and *Lymington* in the said county, on the 23d of *Oct.* 1805; a meeting of us, the Rev. Sir *H. W. Holmes*, Bart., *J. D.* Esq. and the Rev. *J. W.* clerk, three neighbouring justices of the peace, was on the day and year hereunder written duly had, at *Newport*, &c., pursuant to notice to us for that purpose given, as well by the said master and merchants whose goods were on board, as also by *J. W.* Esq. collector of the customs of the port of *Cowes* in the said *Isle*; Now, know ye, that we the said justices, having fully considered the particulars of the claims, charges and demands, charged to be paid and expended by and due to the said several persons respectively, and contained in the first column of the account hereunto annexed, amounting in the whole to 181*l.* 16*s.* 2*d.*, do hereby in pursuance of the statute in that case made and the power to us hereby given, declare that the said several persons are in our judgment respectively entitled to the several and respective sums of money contained in the second column of the said annexed account, amounting in the whole to 714*l.* 19*s.* 4*d.*, and that the same is justly due to them: and therefore we the said justices do hereby settle, adjudge and determine that the said several and respective sums of money contained in the second column of the said annexed account are justly due and payable to the said several persons respectively, clear of all deductions, for their trouble and assistance in saving and preserving the said cargo and materials; and the said quantum of the monies or gratuities for salvage of the said cargo and materials to the said several persons are hereby settled and adjusted at the said sum of 714*l.* 19*s.* 4*d.* In testimony whereof, we the said justices, as well at the request of the said masters and merchants as of the said *J. W.*, have to this our adjudication or adjustment set our hands and seals the 4th of *January* 1806." (Signed and sealed by the three justices.) A copy of this adjudication and award was afterwards served upon the defendant; and the plaintiffs' agent at the same time tendered to the defendant the 714*l.* 19*s.* 4*d.* as directed by the magistrates, and demanded the cargo. The defendant refused to accept the money tendered; contending as he had all along done, that the case was not within either of the acts of parliament which give the magistrates jurisdiction; and now detains the cargo, though the collector of the customs is ready and willing to deliver up the same to the plaintiffs. Supposing the case not to be within the statutes, the sum awarded and tendered has by an arbitrator to whom that point has been referred been found to be insufficient by 274*l.* 11*s.* 9 1-2*d.* The question for the opinion of the Court was whether such adjudication and award of the magistrates were conclusive upon the defendant? If it were, then the verdict entered for the plaintiffs was to stand; if not, then a nonsuit was to be entered.

East, for the plaintiffs, contended that this was a case within the stat. 12 Ann. st. 2. c. 18, whether or not the defendant were to be considered as an agent employed by the owners in the salvage. The mischiefs recited in the act, that stranded ships near home have been plundered and their cargoes embezzled, and when any part has been saved, it has been swallowed up by exorbitant demands for salvage, apply as well to agents as to strangers; and so necessary and just an act ought to be construed most beneficially to repress the mischief and advance the remedy. The first section is merely directory to sheriffs, justices of peace, custom-house officers, and other public officers named, upon application made to them on behalf of wrecked or stranded vessels, to command the constables of the several ports nearest to the sea coast to procure assistance; and particularly to command the assistance of the superior officer of any man of war or merchant vessel at anchor near the place; upon which latter a penalty of 100*l.* is imposed in case of refusal or neglect. But the subsequent provisions of the act are independent of, and more extensive than, the first clause. For by the 2d section, "for the encouragement of *such persons* as shall give their assistance," which includes *voluntary* assistance given by

any person, whether commanded or not by any of the officers named in the 1st section; it is enacted, "that the said collectors of the customs, &c. *and all others who shall act or be employed*" in the salvage, shall, within 30 days after, be paid a *reasonable reward* by the owners, &c. of the distressed vessel. Nothing can be more general than the description of *all others* who shall *act or be employed*: and the latter words seem in terms to include the owner's agents as well as others. The reward is to be *reasonable*. This was meant to exclude all hard bargains extorted by those who offer their assistance under the pressure of the owner's distress. If the express or implied employment of an agent, (and at most the defendant's case only amounts to an implied agency) take the case out of the act, it will in most instances be a dead letter; for then every call for assistance to individuals at hand, however urgent the necessity, will be an implied employment. And this case is no more; for the defendant was a stranger at the time to the master and owners; and the recommendation of the pilots to send to him was merely because, from the nature of his dealing, he was most likely to afford the speediest assistance in boats, cables, &c. Besides, if no case of salvage be within the act, except, upon application to the public officers, the assistance be rendered under their orders, the mischief meant to be prevented will happen while search is making for them, instead of getting the readiest help. And the objection applies with still greater force to foreign ships, which were equally within the view of the legislature, the masters of which cannot be supposed to be cognizant of our laws, and cannot know where to send for such assistance. The 2d section then goes on to provide, in default of a reasonable reward paid by the owners to the salvors, that "the vessel or goods so saved shall remain in the custody of such officer of the customs, &c. until all charges shall be paid, and until the said officer of the customs, &c. *and all others so employed* as aforesaid shall be *reasonably gratified*, or security given to the satisfaction of the parties who are to receive the same." The custom-house officer is hereby appointed a trustee for the salvors, as well as for the crown; and therefore the vessel or goods are to remain as a pledge in his custody until all the charges shall be paid, and every person employed in the salvage is reasonably gratified, or security given (not to his but) to their satisfaction. The legislature could never have intended, when they meant to give a boon to persons in distress, that their property should be kept in pledge for one set of salvors, while another set was suing them at law. Then the act provides that in case the owner, &c. whose property is saved "shall disagree with the said officer of the customs touching the monies deserved by any of the persons so employed as aforesaid, it shall be lawful for the owner, &c. and the said officer of the customs to nominate three of the neighbouring justices of peace, who shall thereupon adjust the quantum of the monies or gratuities to be paid to the several persons acting or being employed in the salvage, &c.; which adjustment shall be binding to all parties." The nomination of the justices is to be made by the owners on the one part, and the custom-house officer, as trustee for all the salvors, and having the pledge in his hands, on the other part. [Lord Ellenborough put the case that the officer might agree with the owners to give the salvors less than they deserved.] That would be a breach of his trust for which the officer would be answerable to the salvors either at law or in equity: but the Court will not presume that he would so misconduct himself. He then referred to other sections (particularly s. 3. and 4,) of the act of Anne, and s. 13, of the stat. 26 Geo. 2. c. 19, as shewing that the Legislature looked to the owner's controul over the wrecked or stranded property continuing, notwithstanding the temporary custody of it confided for a particular purpose to the public officers; and therefore that the general provisions of the act were not confined to cases of compulsory assistance only. But he argued that if the employment of a particular salvor took the case out of the act, the owner would lose the benefit of all those protecting provisions which supposed

a joint controul of the owner and the officers. This construction is strengthened by the stat. 26 Geo. 2. c. 19; which, considering the case of salvors employed by the owners or by the public officers as provided for by the former act, extends the like provisions to those who act of their own accord; and therefore enacts (s. 5.) that in case any person *not employed by the owners, &c. or other persons lawfully authorized* in the salvage of any vessel, &c. shall in the absence of persons so employed or authorized save any ship, &c. he shall be entitled to a reasonable reward, to be adjusted in case of disagreement about the quantum in like manner as by stat. 12 Ann.; or else in the manner therein after prescribed. And then it proceeds (s. 6.) to extend the jurisdiction to other classes of persons of a lower description than justices of the peace; requiring, however, that *five* of them should act in adjusting the salvage; and leaving it optional in the owners and in the collectors of customs to call in three justices of peace under the statute of Anne, or five of the commissioners authorized by the stat. 26 Geo. 2, to adjust the salvage, under the joint provisions of the two acts. He also argued that the circumstances of this case did not amount to a special employment of the defendant by the master or owners. The facts of strangers *sending for a cable and anchor*, (which however came too late,) and afterwards *sending to the defendant for all the help which was necessary*, were no more than calling for the nearest assistance at hand in the hour of extremity; and this was not carried further by the subsequent approbation of the captain after the goods were saved. The act of unloading the ship was after the officers had taken charge of her; and the goods were carried to the defendant's warehouses merely as to a convenient place of deposit, and not upon any special contract that they should be lodged there; and they were kept there under the lock of the officer as well as of the defendant.

Gaselee, contra, insisted that the employment of the defendant by the plaintiffs, in the salvage of the ship and cargo, took the case out of the statutes, and that no case was within them unless where the salvage was made by the orders and under the immediate controul of the public officers named therein. The legislature never meant to deprive the owners and masters of ships in distress of the liberty of employing what agents they pleased to assist them; and therefore by the first section of the st. 12 Ann. st. 2. c. 18, in order to give the public officers any jurisdiction to interfere, it must be "*upon application* made to them, or any of them, *by or on behalf of the chief officer*" of the vessel in distress; and therefore such public officers only are empowered to *command* the necessary assistance. But here no application was made for assistance to the public officers, but only to the defendant. All the subsequent clauses of the act have reference to the first. The 2d section says that "*the SAID collectors of the customs,*" &c. and all others who shall act or be employed in the preserving of any *such* ship or vessel in distress *as aforesaid*, &c. shall be paid a reasonable reward. It supposes that the ship had been taken possession of by the collector or his deputy, in consequence of an application made to him under the provisions of the act, and that it was to *remain* in his possession till the salvors were satisfied; for it uses the word *remain*. There was no necessity for enacting, that persons employed by the owners themselves or their authorized servants, in the salvage, should be paid a reasonable reward by the owners, &c.: Such a provision can only apply to persons employed by others in the same service. And the like observation applies to the other clauses of the act relating to the salvors. Again, the remedy given by the act to the salvors, in case of disagreement with the owners as to the amount of the award, looks to the collector of the customs only, and those employed by him or acting under his authority. He and the owners name the justices who are to arbitrate between them; and no consideration is had of the interest of agents employed by the owners themselves, nor have they any voice in the nomination of the arbitrators. This construction is

rather confirmed than shaken by the provisions of the stat. 26 Geo. 2. c. 10, which, by the very terms of the 5th clause, excludes the case of persons employed by the owners in the salvage; but extends the former provisions to persons voluntarily interfering to save the property; which would not have been necessary if the construction contended for on the first act were well founded, namely, that it extended to all persons *acting or being employed* in the salvage, whether under the direction of the public officers or not. And the 6th section, which extends the jurisdiction to arbitrate to other public officers, plainly refers to a salvage by *their care or direction*; as do all the other provisions of the same statute. He then argued that the Custom-house officers only went on board and inspected the landing of the goods, with a view to secure the king's duties, and not for the purpose of salvage under the acts of parliament. And he also observed, that the collector of the customs at *Cowes*, never was on board at all; nor was *Cowes* the *nearest* port to the place where the vessel was stranded. [The Court, however, laid no stress on this latter circumstance.]

East, in reply, observed principally that the 5th section of the 26 G. 2, did not provide generally for the remuneration of salvors not employed by the owners, &c. but for such persons, *in the absence of persons so employed by the owners or authorized by the public officers*; considering the cases of persons employed by the owners or public officers, or others assisting in the presence of any such, as sufficiently provided for by the former act: and it carries the provision further by entitling the discoverers of concealed effects taken from the stranded vessel to a reward. The Court, he said, would presume that the officers of the customs went on board for the purpose of exercising all the duties cast on them by the legislature, as well for the benefit of the owners of the stranded property as for the crown.

Lord ELLENBOROUGH, C. J. The circumstances disclosed in this case fall in so much with the experience we have had on other occasions of the extravagant demands made and extortions often practised by persons employed by the owners in the salvage of vessels and cargoes, and the construction of the acts contended for on the part of the plaintiffs is so much in unison with our wishes to extend the remedy given by them, as far as we are authorized, to cases of this kind falling alike within the mischiefs recited, that one's judgment is apt at first to be warped in endeavouring to generalize the language of the act, so as to make it comprehend a case which, on an accurate view, does not appear to be within it. The public, however, are much indebted to the plaintiffs for bringing forward the consideration of the question, in order that the attention of the legislature may be drawn to it, and such remedy be applied as may meet the mischiefs disclosed to us in their full extent. But on looking into the enacting clauses, it is much to be lamented, that the legislature has made no provision for a case like the present: it has only provided for cases where application is made by or on behalf of the commander of any vessel in distress to certain public officers, and where the salvage is made through them and others employed by them. Such officers alone are authorized to command the assistance of ships of war and others at anchor near the place. But it has omitted to provide for the case of persons employed in the salvage by the owners where resort has not been had to the public officers named. This is a case of the latter description, where the mate sent on shore to the defendant for assistance, without adverting at all to the acts of parliament, which were not in his contemplation at the time: nor does the course which was pursued square with any of the provisions of them. I should have been well pleased to have considered the first section of the statute of Anne to be merely directory, as it is contended to be: but on reading the second clause, which gives the justices power to arbitrate and adjust the quantum of salvage, between the master of the vessel, or owner, on the one part, and the officer of the customs on the other, looking to these only as the litigant par-

ties, there are words of reference which connect and incorporate it with the first clause; for it does not merely say, "for the encouragement of such as shall give their assistance to *such vessels, so in distress as aforesaid*, and refer to "the *said* collectors of the customs," &c. words which of themselves might not necessarily incorporate the two clauses; but it goes on to state that in default of a reasonable reward paid to the salvors within 30 days after the service performed, "the ship or goods so saved as aforesaid shall *remain* in the custody of such officer of the customs," &c. until satisfaction made. This must refer to the same custody of the property directed to be taken by the public officers under the first section of the act, and cannot admit of any other signification. That, therefore, narrows the mode chalked out by the 2d clause for ascertaining the quantum of compensation, if disputed, to the single case of a previous application on the part of the master or owners to the public officers named in the first clause, amongst whom are the officers of the customs, in whose custody the ship and cargo are ordered to *remain*; and it excludes the case of a voluntary employment of their own agents by the master or owners; the property in that case remaining exclusively in their own custody. The act of George 2d applies to the case of persons volunteering their assistance to save the property under no employment or requisition whatever, either by the owners or the public officers. It was proper to hold out encouragement to all persons to give help to vessels in distress; and their encouragement for saving the ship and goods is the same as was before given in the other cases provided for; and the quantum, in case of disagreement, is to be adjusted by the magistrates or other commissioners named. But the legislature have unfortunately omitted to extend the remedy to a third and most important class of persons, who are most usually employed on such occasions, namely, persons who, like the defendant, have the readiest means at hand of affording assistance, and who are commonly recommended to them, as in this instance, by the pilots, who first come out to a ship in distress: and in consequence of such recommendations they fall into the hands of these persons; and their property, instead of being wrecked and destroyed by the perils of the sea, is swallowed up on shore by exorbitant demands for salvage. It is therefore extremely fit that the attention of the legislature should be drawn to this great evil, and that provision should be made against it by including in the remedy all cases of salvage: making the first clause of the statute of Anne merely directory; but giving resort in all cases to the domestic jurisdiction, to save the unfortunate owners from the pillage of those whom their necessity leads them unwarily to employ in the salvage. It seems to me, therefore, that the award of the magistrates is not binding on the defendant, and that he is entitled to the larger sum given to him by the arbitrator, which, however, is little more than a moiety of his original demand.

GROSE, J. Whether or not the adjudication of the magistrates be conclusive must depend upon the manner in which the one party employed the other, and that other consented to be employed in the salvage: if it were under the act, the award is conclusive: if upon a contract between the owners and person employed, it is otherwise. Now here the contracting parties had no idea at the time that they were acting under the statute: Those on board never applied to any public officer for the assistance directed by the act, which they were bound to have given: but the recurrence to the act, when the dispute about the salvage arose, was plainly an after-thought. The first step taken at the time was to send from the ship to the defendant for an anchor and cable: Had these articles arrived soon after, it is probable that the necessity of further assistance would have been superseded. But the situation of the ship growing worse, the mate afterwards sent to the defendant for all the help that was necessary. Still the act of parliament was never thought of: but the defendant was sent to, as any other agent might be, for assistance. On the other hand, the defendant, without attending to the directions of the act, by

giving notice to the public officers, and taking his orders from them, voluntarily, at the request of the mate, sent his own vessels and men to the assistance of the ship, unloaded it, and lodged the cargo in his own warehouses on shore. In the mean time, indeed, the custom-house officers had gone on board, and they took an account of the cargo, and the collector put his lock also upon the warehouses; but all this was done by them to secure the king's duties. The salvage then was made, not by the public officers acting upon the application of the master, and under the authority of the statute; nor by the defendant acting under them; but by the defendant acting under the employment of the master as a person employed to give assistance for a reasonable compensation. That takes the case out of the statute; and though I am sorry for the consequence, yet I can find nothing which authorizes us to say that this case ranges itself under the statute. The defendant is therefore entitled to receive the compensation awarded to him by the arbitrator, to whom the matter was referred at the trial; which is, at any rate, considerably less than his original demand, the payment of which was properly resisted; and less than that having been tendered, there must be judgment of Nonsuit.

LAWRENCE, J. I agree that the case is not within either of the acts of parliament referred to. The object of these laws was to provide assistance to ships in distress from those who, from their local situation as public officers near the coast, were best able to give it. For this purpose the statute of Anne requires of them, upon application of the chief officer of the vessel in distress, that leaving for the time all other duties, they should give present assistance to those who are in immediate need of it; and they are empowered to command the assistance of others for the same purpose. It was reasonable, therefore, that these persons, whose services were thus compelled to be given, should have a reasonable gratification secured to them by the same law. And in ascertaining how this was to be done in case of disagreement with the owners by whom it was to be paid, it is not immaterial to consider who are the contending parties contemplated by the legislature, and for whom the provision made is adapted; these are the owners on the one hand, and the collector of the customs on the other, in whose custody the property saved is directed by the second clause to remain, and who is charged to take care of the interests of those employed in the salvage under the direction of the public officers. There was another class of persons for whom the legislature afterwards made provision, and these are volunteers bringing in from sea vessels in distress, who were deserving of encouragement. These also, are by the act of Geo. 2, in case of disagreement with the owners as to the quantum of salvage, to have the same security upon the property in the hands of the collector of the customs, and their compensation is to be adjusted and paid in the same manner as is provided by the former statute. It is difficult indeed to understand how such a provision, which was properly enough adapted to persons employed by the public officers in the salvage under the first act, came to be applied to volunteers under the second act, who had no privity with the collector of the customs; except by supposing that the provision for the latter arose out of, and followed the enactment of the first act, which had before placed the property saved in the hands of the collector, for the benefit of all those whose services it compelled, and of those who were employed by them. And therefore I take it, that when the first act passed, the legislature looked only to the persons between whom the contract for salvage was to be made, namely, the owners on the one hand, and the public officers and those employed by them on the other: it therefore provided only for the compensation of the latter, and for the means of adjusting that compensation in case of dispute. And the second act, was only intended to enlarge the provisions of the first, by providing the same remedy for volunteers acting in the salvage without any authority, as had been before provided for those whose services were compelled,

and others employed under them; but still it did not include persons who were employed by the master or owners themselves. It seems however, from the different wording of the act of Geo. 2, (though I have not sufficiently considered it with that view, nor is it necessary for the present purpose) as if it meant to empower the officers therein named to assemble, and give assistance to the vessel in distress, without being called upon by the parties interested. (a) I concur entirely with what my Lord has said respecting the necessity of some legislative provision to meet cases like the present. It often signifies little to the owners whether their property be lost by wreck, or by the plunder of the salvors whom they employ. I think, therefore, that persons of this description, though employed by the owners in the salvage, should only be entitled to such remuneration as the magistrates, &c. shall think proper; perhaps not conclusively, but with the liberty in certain cases to refer their claims to the Court of Admiralty, or to the courts of law.

LE BLANC, J. The plaintiffs cannot maintain this action, because they did not proceed under the act of parliament in procuring the salvage to be made; and therefore the tribunal resorted to for the purpose of settling the amount of it had not competent authority to form the judgment which they pronounced. The legislature in the statute of Anne did not contemplate the case of a master or owner employing his own agent in the salvage; not foreseeing that cases would arise in modern times wherein merchants would require as much protection from agents employed by themselves as from others. All the provisions of the act look only to persons employed in the salvage through the medium of the public officers. The property saved is placed in the custody of the collector of the customs for the benefit of those acting under him; and in case of disagreement the magistrates are to be named by him and the owners; considering those as the only parties interested. In this case, the officers took upon themselves no part of the salvage, except so far as was necessary to secure the duties due to the crown. Some of them continued, indeed, on board while the cargo was unloading, and others saw the goods landed and warehoused; but that was in the ordinary exercise of their official duty, to prevent any of the goods being run on shore clandestinely. But all the salvors were paid by the defendant as the agent for the owners. The case, therefore, is not within the statute of Anne. Then the act of Geo. 2, was for the encouragement of persons who happening to find ships deserted at sea, or goods cast on shore, should bring them into port, and place them in safe custody, though not employed by any person so to do; and it provides for them the same reasonable satisfaction as under the former statute, to be adjusted, in case of disagreement about the quantum, in like manner as the salvage is to be adjusted and paid by virtue of that statute. Now, it might be a doubt whether that meant that in case of disagreement it should be settled through the medium of the *same litigant parties* as under the former statute, namely, *by the collector of the customs* on the one side, and the owners on the other; or by the owners on the one side, and the party who had volunteered his services to save the wreck on the other side; such volunteers, within the statute of Geo. 2, not having been employed under the authority of the collector or other public officers, as the salvors provided for by the statute of Anne, and therefore having a distinct interest of their own; and the disagreement to be adjusted being between those volunteers and the owners; and not, as under the former statute,

(a) The 6th section of the st. 26 Geo. 3. c. 19, empowering the magistrates, &c. nearest to the place where any ship, &c. shall be stranded, *forthwith* to give public notice of a meeting of the officers therein named, who are required to give aid in execution of this and the former act, and to employ proper persons for the saving of ships in distress, &c. omits the words "upon application made to them, or any of them, by or on the behalf of any commander or chief officer of any ship, &c. in danger of being stranded," &c. which are to be found in the corresponding clause of the statute of Anne.

between the latter and the collector of the customs. However, it is not necessary at present to give any opinion on that point: it is sufficient to say, that at any rate this is not a case within either of the statutes.

A Nonsuit to be entered.

The King v. The Inhabitants of Castell Careinion.

8 East, 77. Nov. 22, 1806.

The party interested in a witness' testimony, who was objected to on account of his having been convicted for felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself.

TWO justices, by an order, removed *Gainor Price*, the wife of *Owen Price* (therein stated to have been convicted of felony, and committed to *Cardigan* gaol) and their children, by name, from *Aberystwith*, in the county of *Cardigan*, to *Castell Careinion*, in the county of *Montgomery*: against which order the latter appealed; and on hearing of the appeal at the sessions, it was proposed by the respondents to examine the said *Owen Price* (then being present in court in the custody of the gaoler,) to prove that he had gained a settlement in the appellant's parish by renting a tenement of the annual value of 10*l.* and residing on part thereof, in the said parish, for more than 40 days. It appeared by the evidence of *Owen Price*, and also of the gaoler, that *Owen Price* was at the preceding great sessions at *Cardigan*, on the 26th of *March* 1806, convicted of grand larceny; but the record of such conviction was not produced on the trial of the appeal, nor a copy thereof; and that on such conviction he prayed the benefit of the statute, and the same was allowed to him. And that the court of great sessions ordered him, for his said offence, to be kept and detained in the common gaol of the said county for 12 calendar months. The sessions were thereupon of opinion, that by reason of the said conviction, and until the expiration of his imprisonment, *Owen Price* was not a competent witness, and refused to allow the respondents to examine him concerning his settlement. The respondents then applied to the court to respite the further hearing of the appeal; which they refused; and quashed the order of removal, subject to the opinion of B. R. on the foregoing statement.

Abbott and *Peake*, in support of the order of sessions, said, that the question in this case was not, whether the witness were bound to have answered the question, as to his own conviction; but whether it were not competent to him, no objection being made by himself, to admit the fact of his conviction: especially in a case affecting his own settlement.

LORD ELLENBOROUGH, C. J. We must take it upon this case, that the evidence was objected to at the sessions by the party interested in repelling it, and there cannot be the least doubt that the objection was well founded. The evidence went to affect the rights of third persons, namely, the litigant parishes; for the pauper himself is no party to the cause in court. Whether or not the witness were convicted of the felony would appear by the record: and it cannot be seriously argued, that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor: This can only be known by the record: and there is no authority for admitting parol evidence of it.

LAWRENCE, J. The books are uniform in requiring the production of the record to prove a witness convicted of an offence. 2 Hawk. ch. 46. s. 20. 3 Com. Dig. Evidence, 280. 5 Com. Dig. Testmoigne, 516. Bull. N. P. 292.

The other judges concurring.

Order of Sessions quashed.

Touchet was to have argued against it.

Gale and Others v. Reed.

8 East, 80. Noy. 25, 1806.

By indenture between *A. & B. & C.*, dissolving their partnership, as rope-makers, *A.* and *B.* covenanted to allow *C.* during his life, 2s. on every cwt. of cordage which they should make on the recommendation of *C.* for any of his friends and connexions, and whose debts should turn out to be good; and that *A.* and *B.* should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of *C.*'s connexions whom they should be disinclined to trust. And *C.* covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted, or to be contracted, in his or their names, pursuant to the indenture, should be the exclusive property of *A.* and *B.* and that *C.* should, during his life, exclusively employ *A.* and *B.*, and no other person, to make all the cordage ordered of him, by or for his friends and connexions on the terms aforesaid, and should not employ any other person to make any cordage on any pretence whatsoever. Held,

- 1st. That the covenant by *C.* to employ *A.* and *B.* exclusively to make cordage for his friends, and not to employ any other, &c. *A.* and *B.* not being obliged to work for any other than such as they chose to trust, was not illegal and void as being in restraint of trade without adequate consideration; for the whole indenture must be construed together, according to the apparent reasonable intent of the parties; and the general object being only to appropriate to *A.* and *B.* so much of *C.*'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and *C.* was still at liberty to work for any of his friends who were refused to be trusted by *A.* and *B.* by which construction the restraint on *C.* was only co-extensive, as in reason it could only be intended to be, with the benefit to *A.* and *B.*; and therefore the restraint on *C.* could be no prejudice to public trade.
2. That breaches assigned generally against *C.* for having made cordage for divers persons other than for government, and for employing other persons than *A.* and *B.* to make cordage for his friends, &c. were well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c.; such facts lying more particularly within *C.*'s knowledge.

THIS was an action of covenant, brought by the three plaintiffs against their late partner *Reed*, for breaches of a covenant contained in an indenture, confirming and carrying into further effect a prior indenture made between them for the dissolution of their partnership; and which indenture, made the 31st of January 1804, whereupon the breaches are assigned, is as follows: "Whereas the said parties have further agreed to confirm the said deed of the 10th of January instant, so far as it relates to the dissolution of their said copartnership, and the mutual releases therein contained; and in all other respects to declare the said deed of the 10th of January, instant, void and of no effect: and they have also mutually agreed to enter into such covenants respectively as are hereinafter expressed and contained: Now this indenture witnesseth that, in pursuance and performance of the said agreement, they, the said *E. Gale* the elder, *E. Gale* the younger, and *J. Gale*, and the said *S. Reed* have mutually dissolved, and by these presents do dissolve their said copartnership, and do declare that the same shall from henceforth cease and determine to all intents and purposes whatsoever. And this indenture further witnesseth, that in further performance of the said agreement, the plaintiffs, for themselves, their heirs, executors, &c. covenant with the defendant, his executors, &c. that they, the plaintiffs, shall, from time to time, and at all times hereafter, during the natural life of the defendant, pay and allow to him and his assigns 2s. on every 100 weight of cordage, which, from the 14th of December last, shall appear to have been made by them the plaintiffs, on the recommendation of the defendant, and delivered to any person or persons whomsoever, who are or may be of the number of his particular friends and connexions, and whose debts shall turn out to be good. And further, that they, the plaintiffs, shall bear all losses which may happen by means of any of the debts which may be contracted with any of the said persons, the particular friends and connexions of the defendant: provided that nothing herein con-

tained shall extend to the removing the liability of the defendant as an owner of any ship which may be supplied *with cordage or other things* by the plaintiffs, to pay their bills for the same, or to the *compelling* the plaintiffs to furnish any cordage or other goods to any connexions of the defendant, whom they shall be *disinclined to trust or give credit to*. And the defendant doth hereby for himself, his heirs, executors, &c. covenant with the plaintiffs, their executors, &c. in manner following, viz. That he the defendant, shall not in his lifetime carry on the business of a rope-maker, or make cordage for any person or persons whomsoever, (*except any contract which the defendant may hereafter enter into to make cordage, new or old, or any other articles, for government, or any public board, and which he shall have free liberty, from time to time, to execute and complete.*) And the defendant doth further covenant with the plaintiffs, that *all the debts due, and to become due, for cordage or other things sold or to be sold, whether in the firm of Gale, Reed, and Gales; E. Gale and Company; or in the name of the defendant, pursuant to any engagements contained in any preceding contract or covenant entered into between them the said parties hereto, pursuant to the terms of this present indenture, are and shall be the exclusive property of the plaintiffs, their executors, &c.* And that the defendant, his executors, &c. shall not, at any time or times hereafter, willingly do or suffer any act or thing to hinder or disturb the plaintiffs, their executors, &c. in obtaining the said debts, or any of them. But in case any of such debts shall at any time or times hereafter be received by the defendant, he shall immediately on such receipt, from time to time, *pay over the same to the plaintiffs, their executors, &c. without any deduction whatsoever*. And further, that the plaintiffs shall, and lawfully may, use and keep possession of the rope-walk belonging to the defendant, situate at *King David's Fort* aforesaid, with the fixtures, utensils, and appurtenances thereunto belonging, until the 31st of *May* now next ensuing, without any hindrance or interruption from or by the defendant, his executors, &c. And lastly, that the defendant shall, during his life, continue to *employ exclusively* the plaintiffs, to make all the cordage which may be ordered of him *by or for the particular friends and connexions* of the defendant *on the terms aforesaid*, and shall not employ any other person or persons whomsoever to make any other cordage, or any part thereof, under any pretence whatsoever. The breaches assigned were, 1st, that after the making of the indenture the defendant carried on the business of a rope-maker, and made cordage for divers and very many persons other than by virtue of any contract which the defendant had entered into after the making of the said indenture, to make cordage, &c. for government, contrary to his covenant. And 2dly, That the defendant, after the making of the indenture, did not nor would (though often required) employ the plaintiffs to make all or any part of the said last-mentioned cordage, according to the indenture, but neglected so to do, and employed divers other persons to make the said last-mentioned cordage; although the plaintiffs were ready and willing to make the same on the terms in the indenture mentioned; contrary to the said indenture, &c. To the declaration assigning these breaches, in making cordage for others, and employing others to make cordage, the defendant, after enrolling the indenture at large, demurred to the first breach; assigning for cause, "that the plaintiffs had not shewn or disclosed any, and what particular person or persons for whom the defendant made cordage, or any and what particular quantities or kinds of cordage the defendant did so make for them; nor in what manner or by what acts he carried on the said business of a rope-maker, as is alleged in that breach of covenant. And he demurred also to the second breach; assigning for cause, that the plaintiffs have not shewn or disclosed by what particular friends and connexions the quantities of cordage mentioned in that breach were ordered; or shewn or disclosed any and what particular quantities or kinds of cordage were so ordered by them, or any and what particular persons were employed by the de-

fendant to make such cordage. Concluding with the general allegations of insufficiency.

This case was argued in *Trinity* term last, by *Hobroyd* in support of the demurrer, and *Laves* contra. The questions turned, 1st, on the construction of the particular covenants, whether illegal and void, as being in particular restraint of trade, without adequate consideration; 2dly, upon the general manner of assigning the breaches. The general question has been discussed so often and so much at large in other reported cases; and the Court, in giving judgment, went so fully into the application of the general principle to the particular covenants in question, that it is unnecessary to repeat the arguments. The cases cited on the general principle were *Mitchell v. Reynolds*, 1 Pr. Wms. 181, which collects all the antecedent authorities, and Mr. *Coze's* notes supply others. *Garrick v. Barry*, cited in *Shubrick v. Salmond*, 3 Burr. 1639; *Chesman v. Rainby*, 2 Stra. 739; *Clerke v. Comer*, Rep. temp. Hardw. 53. 7 Mod. 230, and *Davis v. Mason*, 5 Term Rep. 118, (and *vi. Bunn v. Guy*, 4 East, 190.) And in respect to the special causes of demurrer were cited *PAnson v. Stuart*, 1 Term Rep. 748; *Farrow v. Chevalier*, 1 Salk. 139, and *Barton v. Webb*, 8 Term Rep. 459. The case stood over for consideration till this term, when

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court. After stating the pleadings as above—It has been contended, on the part of the defendant, that the covenant on which the breaches have been assigned is void, as being a contract made in *particular restraint of trade, without adequate consideration to the party restrained*; upon the authority of *Mitchell v. Reynolds*, 1 P. Wms. 181, and other cases. And also, that the breaches are ill assigned in point of form, inasmuch as the "*divers other persons*" alleged to have been employed to make cordage for the defendant, (as complained of in those breaches,) are generally *so* described, without mentioning them particularly by their names, or stating the kinds and quantities of cordage made, &c., as the defendant's counsel contended ought to have been done. As to this objection of form, and which is the cause specially assigned for demurrer, the answer given to it by the plaintiff's counsel, viz. that as the facts alleged in these breaches lie more properly in the knowledge of the defendant, who must be presumed consant of his own dealings, than of the plaintiffs, there was no occasion to state them with more particularity; is in our opinion a sufficient answer in point of law. What is laid down to this effect in *Robt. Bradshaw's* case, 9 Co. 61, and Cro. Jac. 304, and in several later cases, which are all collected in the case of *Barton v. Webb*, 8 Term Rep. 459, and in a note of my brother *Williams* to the case of Lord *Arlington v. Meyrick*, 2 Saund. 411, has settled the law on this point; in opposition to the case of *Jones v. Williams*, Dougl. 214, which has been overruled in the two late cases of *Shum v. Farrington*, 1 Bos. & Pull. 640, and *Barton v. Webb*, 8 Term Rep. 459.(1)(2)

Laying therefore this objection of form out of the case, it remains to be considered, whether the covenant in question be void, upon the ground already mentioned, viz. "as being a *particular restraint of trade, without adequate consideration.*" The object and intention of the parties to this indenture appears to have been to devolve upon and exclusively to appropriate to the *Gales*, the plaintiffs, all the *beneficial private* trade of the defendant in this business of rope-making; leaving him at liberty to make and execute on his own account such contracts for cordage as he had made or might enter into with *government* or any of the *public boards*. The indenture uniformly contemplates this private trade as a trade carried on *upon credit* only. The only compensation which the indenture provides for the defendant, as the considera-

(1) Vide 1 Chitty on Pleadings, 330. 624.

(2) [See 1 Chit. Pl. (7th Am. ed.) p. 332, 333-4.—W.]

tion for his restraint, and for the benefit to be derived to the plaintiffs in this respect, is a payment and allowance of 2s. on every hundred weight of cordage, which, from the 14th of *December* preceding should appear to have been made by the plaintiffs on the recommendation of the defendant, and *delivered to the order of his particular friends and connexions, and whose debts should turn out to be good*: The plaintiffs agreeing to bear all losses which might happen by means of any of *the debts* which might be contracted with any of these particular friends and connexions of the defendant. But, as the plaintiffs were subjected to this eventual loss by *bad debts*, it was reasonable that they should be allowed to exercise their own discretion as to the persons to whom they should *give credit*. It is therefore accordingly provided by the indenture, "that nothing therein contained should extend, or be construed to extend, to the compelling the said plaintiffs to furnish any cordage or other goods to any connexions of the defendant whom they might be disinclined to trust or give credit to." The trade therefore which the indenture contemplates the plaintiffs as exclusively occupying is the furnishing of cordage for such of the defendant's customers and friends as the plaintiffs should choose to trust: and the restraint on one side meant to be enforced should in reason be co-extensive only with the benefits meant to be enjoyed on the other. And as the carrying the restraint further would be arbitrary and useless as between these parties, a construction which would have that effect must be reluctantly resorted to, and not adopted at all, if the general scope of the whole indenture will allow a different sense to be put upon the words of any particular covenant. The indenture does not in any part of it suppose or advert to any case of furnishing cordage, &c. to any connexions of the defendant, but upon trust or credit. It then provides that debts to become due for cordage, &c. sold in the joint names of them all, pursuant to the terms of that indenture, should be the *exclusive property* of the plaintiffs: That the defendant should do no act to hinder or disturb the plaintiffs in obtaining the *said debts*; but in case any of *such debts* should be received by him, that he should pay them over to the plaintiffs. After these provisions follows the covenant upon which the immediate question arises. "And lastly, that he, the said defendant, shall and will, "during the term of his natural life, continue to *employ exclusively* the said "plaintiffs to make all the cordage which may be *ordered of him* by or for the "particular friends or connexions of the said defendant, *on the terms aforesaid*; and shall not, nor will employ any other person or persons whomsoever to make any other cordage, or any part thereof, under any pretence "whatsoever." The covenant is, it will be observed, to employ the plaintiffs *exclusively* to make the cordage which may be ordered "*on the terms aforesaid*." These latter words incorporate in this covenant, by reference, all the antecedent provisions of the indenture containing the terms upon which this exclusive employment was to be given to the plaintiffs. What then are those terms? principally these: the allowance of 2s. per cwt. to the defendant upon goods furnished on his recommendation, where the debts turned out good; and a liberty to the plaintiffs to refuse the orders of persons they should be disinclined to trust. As these refused orders could of course produce no good debts to the plaintiffs, they could not of course produce any fund for the allowance of 2s. per cwt. to the defendant, which was to arise only out of *debts* turning out to be *good*. They were therefore orders not within the scope of the *exclusive* employment stipulated for, and to which the stipulated compensation could not apply; and which, after being so refused by the plaintiffs, might therefore be executed by the defendant, he being restrained only as to cordage, &c. ordered *on the terms aforesaid*, of which terms the payment of 2s. per cwt. out of good debts was the most important and material. Supposing the former part of this covenant to be, for the reasons given, properly narrowed by the terms of dealing to which it refers, it will hardly be contended that the more general words to be found in the latter part of the same covenant shall

not be restrained and qualified by the same context. The words are, "and shall not nor will employ any other person or persons whomsoever to make any other cordage, or any part thereof, under any pretence whatsoever." To construe them according to the strict letter would impose a restraint without compensation to the party restrained, and to the possible prejudice of the public. Whereas to construe them with reference to the immediately antecedent words of the covenant in question, and to the true scope and object of the whole indenture, renders the sense uniform and consistent throughout, makes the compensation and restraint commensurate with each other, and obviates the possible inconvenience both public and private, which might result from a different construction. And this mode of construction is agreeable to the received rules and maxims, as well as to the authorities of law; for as is said in *Plowd.* 18., "The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself and the intent thereof also accomplished." So Lord *Hobart*, 275., "The law being to judge of an act, deed, or bargain, consisting of divers parts, containing the will and intent of the parties, all tending to one end, doth judge of the whole, and gives every part his office to make up that intent, and doth not break the words in pieces." And accordingly in many cases the most general words in a deed have been holden to be narrowed and restrained by the apparent object and intent of the parties, as collected from other parts of the same deed. Thus in *Broughton v. Conway*, Moor, 58, in debt upon obligation with this condition, that whereas the defendant had sold to the plaintiff a lease for years of the manor of *S.*, *he would not do nor had done any act to disturb the plaintiff's possession of it; but that the plaintiff should hold and enjoy this peaceably, without the disturbance of the defendant, or any other person: it was holden by all the justices, that the defendant was not bound by the words of the condition to warrant peaceable possession to the vendee, but only against acts done or to be done by himself; and that all the sequel of the condition which comes after the word but shall be referred to the antecedent part of the condition, and expounded and extended in like manner; that is to say, that he shall enjoy it without disturbance of any person or persons by any act by him done, or to be done.* So the case cited in *Shep. Touch.* 169, as determined by *Bridgman*, Justice: if one make a lease for years of a manor, and covenant that the lessee shall make estates for life or years, and that they shall be good; in this case, it seems this covenant shall not be taken to enable the lessee to make estates for a longer time than his estate will bear. Feeling ourselves therefore warranted, by these and other authorities of the law, in narrowing, according to the intention of the deed, the general words of the restrictive covenant to those cases of restraint only in which the party restrained can have the stipulated benefit for his restraint; and the party, in whose favour the restraint is created, shall choose to avail himself of the restraint imposed upon the other; the covenant in question will stand clear of the objection made to it, as being a particular restraint of trade without adequate consideration; and that objection being removed out of the way, (as for the reasons above-stated we think it is,) the plaintiff is entitled to judgment. (1)

(1) [So a party may legally restrict himself from pursuing his trade for an indefinite period, on his own account, except as an assistant. *Wallis v. Day*, 2 M. & W. 273;—or within particular limits. *Clark v. Crow*, 2 Barn. 463. So a trader may sell a secret, and restrict himself from its use. *Bryson v. Whitehead*, 1 S. & S. 74, & n. a.—W.]

Doe on the Demise of Harris v. Greathed and Others.

8 East, 91. Nov. 25, 1806.

One having purchased of *A.* the manor and certain lands of and in *Hampreston* in the counties of *Dorset* and *Hants*, and having settled a rent charge on his wife out of his manor of *Hampreston* in the county of *Dorset*, and all other his lands, &c. in *Hampreston*, aforesaid, which he bought of *A.*; and having afterwards purchased of other persons other lands in *Hampreston* in *Hants*, (which were near to another estate of his called *Uddens* in *Dorset*;) by his will, reciting and confirming the settlement, devised to trustees, "the said Manor, &c. and other hereditaments of and in *Hampreston* aforesaid, and all other the manors, lands, farms, &c." and other hereditaments in or near "*Uddens* aforesaid, or elsewhere in the said county of *Dorset*," to trustees for different uses; amongst others giving his wife an additional rent-charge, payable out of "the manors and hereditaments in the said county of *Dorset*:" and as to all and singular "the said manors and other hereditaments in the said county of *Dorset*, with their appurtenances, &c. charged as aforesaid," he devised the same to the first and other sons of his body, remainder to his daughters, in strict settlement; and if all but one of his daughters died without issue, "then as to the entirety of the said manors and other hereditaments," to the daughters of his remaining daughter in tail, &c.; remainder to the lessor of the plaintiff, his nephew, and heir at law, remainder to his sons and daughters in strict settlement, remainders over to other junior nephews in like manner: with power to the trustees to raise money on the security "of the manors and other hereditaments in the said county of *Dorset*;" and also to sell the devised lands, except such as were situate at *Uddens* or *Hampreston* aforesaid, and to purchase other lands in fee within the said manor of *Hampreston*, in the said county of *Dorset*," &c. The deviser, by a subsequent codicil, in which he speaks of the prior devise of his *Dorsetshire* estate, revoked the devise to the lessor of the plaintiff. Held that the *Hampreston* lands lying in *Hants*, and not purchased of *A.* though situated within and surrounded by the general ambit of *Dorsetshire*, and also near *Uddens*, and holden together with and as part of, a *Dorsetshire* farm, did not pass by the will; which was confined in express terms to the manor and lands in *Hampreston*, purchased of *A.* (by force of the words "said manor, &c. and hereditaments aforesaid," referring to the recital of the settlement,) or which lay in the county of *Dorset*, (by the addition of the latter words; which would not have been necessary, if the deviser had meant to pass all his lands near *Uddens*, in whatever county situated.) For though when a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous; yet it is otherwise where the thing at first described is uncertain; as here, lands, &c. near *Uddens*.

THIS was an ejectment brought by the lessor of the plaintiff, as heir at law of *E. Greathed*, Esq. on demises laid subsequent to *E. G.*'s death; and at the trial before *Le Blanc*, J. at *Winchester* in 1805, a verdict was found for two of the defendants who were in possession of leasehold estates only, and for the plaintiff against the other defendants, subject to the opinion of the Court on the following case.

The lessor of the plaintiff is heir at law to *Mr. Greathed*, who died seised in fee of the premises on the 18th of *January* 1803. *Mr. Greathed*, on the 13th of *October* 1790, purchased of *Lord Arundel*, who by bargain and sale of that date conveyed, the manor or lordship of *Hampreston*, in the several counties of *Dorset* and *Southampton*, with its rights, royalties, members, and appurtenances, and the advowson of the rectory of *Hampreston*, and all glebe lands, tithes, &c.; and all the messuages, farms, lands, tenements, cottages, rents, and hereditaments of him, *Lord Arundel* situate lying and being within or arising out of or from the manor, parish, hamlet, place, precinct, or territory of *Hampreston* aforesaid, with their and every of their appurtenances, to the use of *Mr. Greathed* in fee. And by indentures of lease and release of the 16th and 17th of *October* 1795, being a settlement made before his marriage with *Jane Glover*, *Mr. Greathed* conveyed "all that the manor or lordship of "*Hampreston* in the county of *Dorset*, and all other his messuages or tenements, farms, lands, and hereditaments in *Hampreston* aforesaid which were lately purchased by him from *Lord Arundel*, and conveyed by *Lord Arundel* to him in fee, with their rights, members, and appurtenances, and the reversion,

"&c. unto *M. Raper* and *W. W. Bird* and their heirs, for securing (inter alia) "a yearly rent charge, for his intended wife;" and a term of 99 years was also limited to the trustees for that purpose. The premises recovered by the verdict are about 120 acres, situate in the hamlet of *Longham* within that part of the manor and parish of *Hampreston* which lies in *Hampshire*. The parish and manor of *Hampreston* are co-extensive, and lie within the general boundary of the county of *Dorset*, about 2 miles distant from the general boundary of *Hampshire*. Mr. *Greathed's* estates in *Dorset* and *Hants* exceed 4000 acres, of which the *Uddens* estate contains 500 a.; wastes in *Hampreston* 2110 a.; farm lands in *Hampreston* in the county of *Dorset* about 1270 a.; the lands recovered by the verdict as in *Hampshire* about 120 a. Other persons have freehold lands in *Hampreston* in *Dorsetshire*, which amount to about 200 acres: and other persons have also some freehold lands in *Hampreston* in *Hampshire*. The annual value of the lands recovered by the verdict is about 150*l*. The rental of Mr. *Greathed's* estate in *Hampreston*, including the lands recovered, is about 1200*l*. per annum. The *Hampshire* lands recovered by the verdict lie in small scattered pieces, many of them surrounded entirely by lands in the county of *Dorset*, and all of them lying within the general boundary of that county. The other *Hampshire* lands abovementioned (i. e. of other persons) are similarly situated. The lands recovered were not purchased by Mr. *Greathed* of Lord *Arundel*, but of different persons, prior to the date of his will, (except in the instance of certain lands which were purchased with the manor and farm of *Hilham* lands, and of a house called *Belle Vue*; and this purchase was completed before the making of the last codicil hereinafter stated :) and they principally consist of certain parts of four estates called *Redmans*, *Mitchells*, *Frouds*, and *Lynes*, or *Haywards*, lying as before described in the county of *Hants*; the other part thereof lying in *Dorset*. About 40 acres of the premises are common field arable land. The closes called *Stirts*, part of the lands recovered, consist of about 13 acres, are situate in *Hampshire*, and are parcel of a manor and farm called *Hilham* lands, containing about 114 acres, and lying (with the exception of *Stirts*) in the county of *Dorset*. Both before and since Mr. *Greathed's* purchase *Stirts* have been let and occupied with *Hilham* lands farm. The rest of these lands, when bought by Mr. *Greathed* at different times, were in the hands of different occupiers; and as their several interests determined he laid them in such parcels as he thought convenient to different farms of his own in *Dorsetshire*. Mr. *Greathed* knew distinctly that the lands recovered were in *Hampshire*. In a lease granted by him to *John Parmiter* of *Hampreston* farm the parcels are thus described, *all that farm called Hampreston farm, situate at Hampreston in the county of Dorset, and parcel of the said manor of Hampreston*, now in the occupation of him the said *E. Greathed*, consisting of the particulars therein enumerated, amongst which are between 7 and 8 acres of meadow land, part of *Redmans*, and part of the premises recovered, and which had been thrown to that farm by the testator. One only of his tenants, *J. B.*, one of the defendants, had more *Hampshire* than *Dorsetshire* land. The testator was seised in fee of the manor and farm of *Uddens* where he resided, which is in *Dorsetshire*, in the parish of *Chalbury*, immediately adjoining the northern boundary of the parish and manor of *Hampreston*, and about 3 miles distant from the remotest part of the premises recovered. *Hamwood*, part of the premises recovered, is divided from *Uddens* farm only by a rivulet and a lane. Mr. *Greathed* by his will dated the 20th February 1796, reciting that by indentures of lease and release of the 16th and 17th October 1795, being a settlement made before the marriage with *Jane* his then wife, he had conveyed his manor of *Hampreston* in the county of *Dorset*, and his messuages and tenements, farms, lands and hereditaments in *Hampreston* aforesaid, with their and every of their rights, members, and appurtenances, which said manor and other hereditaments were then lately purchased by him from Lord *Arundel*, unto *M. Raper* and *W. W.*

Bird and their heirs, for securing a yearly rent charge for his wife, with the usual powers of distress, &c. and also by a term of 99 years, &c. ratified and confirmed the said rent charge, powers, &c. and term of 99 years; and then devised as follows: "I give and devise unto *W. Wilberforce* and *W. W. Bird* " and their heirs *the said manor* or lordship, messuages or tenements, and " other hereditaments of and in *Hampreston aforesaid*, and all and singular " other the manors or lordships, &c. messuages, lands, tenements, farms, " and other hereditaments, situate, lying and being in or near *Uddens aforesaid*, or elsewhere in the said county of *Dorset*, and all and singular the " manors or lordships, lands, &c. situate in the county of *Lincoln*, of which " I or any persons in trust for me am or are seised or entitled to for any estate, " &c. (freehold or copyhold) in possession, reversion, remainder, or expectancy, with their and every of their rights, members, and appurtenances; " to hold the said manors, &c. and all and singular other the premises hereby " devised, or expressed or intended so to be, with their appurtenances (but " as to the said manor and other hereditaments of and in *Hampreston aforesaid*, subject and charged as herein-before is mentioned) unto the said " *W. Wilberforce*, and *W. W. Bird*, their heirs and assigns, to and for the " uses and trusts, &c. and subject to the powers, &c. hereinafter expressed; " viz. as to all and singular the manors or lordships, messuages, lands, " tenements, and hereditaments in the county of *Dorset*, to the use, intent " and purpose that my wife may during her life and widowhood, and the " minority of any son who under my will may for the time being be " entitled to the said manors and other hereditaments in the said county of " *Dorset*, or any part or share thereof, occupy the mansion-house at *Uddens* " aforesaid, and the gardens, &c. belonging thereto, and all the land or ground " adjoining to or near the same, as occupied by me as a farm or otherwise, " and that no rent or other consideration whatsoever shall be payable by her " for the same; and that all taxes and repairs for keeping the said house, &c. " and grounds in the same state in which I shall leave the same shall be paid " out of the rents and profits of my said *Dorsetshire estates*; and that during " such minority I direct that my wife shall during her widowhood receive the " rents, issues, and profits of all my said estates in the said county of *Dorset*, " and thereout pay the taxes, repairs, and expences aforesaid; in the next place, " shall pay on account of the child so entitled to my said manors and other " hereditaments such annual sum for maintenance as she shall think fit, and " apply the surplus of the said rents, issues and profits as herein mentioned." The testator then goes on, that in default of issue of the said testator (which happened to be the case) he gave his wife, in addition to the yearly rent charge of 400*l.* provided for her by the before recited indentures, the annual sum of 200*l.* to be charged upon and payable out of all and singular the manors and other hereditaments in the said county of *Dorset*. And as to all and singular the said manors and other hereditaments in the said county of *Dorset*, with their rights, members, and appurtenances, subject and charged as before mentioned, he devised the same to the use of the first and other sons of his body for life, with divers remainders over in favour of his own issue; which never took effect; the testator dying without ever having any issue; remainder, if all but one of his daughters die without issue, then as to the entirety of the said manors and other hereditaments, to the daughters of his remaining daughter as tenants in common in tail; remainder to his nephew *J. Greathed Harris*, (the lessor of the plaintiff,) for life; and so on to his sons and daughters in strict settlement; remainder to his nephews *George*, *Edward*, and *Thomas Herbert Harris*, and his niece *Mary Harris*, the younger brothers and sister of the said *J. G. Harris*, and their sons and daughters successively in strict settlement; remainder to the said *W. W. Bird* in fee. Power was given to the trustees to raise money on the security of the manors and other hereditaments situate in the said county of *Dorset* therein-before mentioned

to be thereby devised : and the same was directed to be invested in the purchase of lands of inheritance to be situate *in the county of Dorset*, or of copyhold lands convenient to be held therewith or with the lands thereby devised. Leasing and jointuring powers were also given to the several takers for life of these premises, which the testator sometimes described as his *manors or hereditaments in the said county of Dorset*, and sometimes as his *Dorsetshire estate*. Then followed a power to the trustees, at the request of the party entitled, to sell any part of the hereditaments thereby devised or intended so to be (except such of the said hereditaments as were situated at *Uddens* or *Hampreston* aforesaid, or either of them,) and to purchase other lands and hereditaments in fee simple in possession, to be situate somewhere *within the said manor of Hampreston in the said county of Dorset*, or of copyhold or leasehold lands convenient to be held therewith, or with the lands purchased. The testator by a codicil dated the 2d of June 1797 declared that if there should be a failure of issue of his body during the widowhood of his wife, he devised all and singular the estates devised by, or which should be purchased under the trusts of, his will to his wife during her widowhood : and after making some other alterations in his will, not affecting the present question, he in other respects ratified the same. He also re-published, ratified, and confirmed his will by two other codicils dated respectively the 27th September 1797, and 10th April 1802. The testator by another codicil, dated 15th May 1802, gave several annuities to persons therein mentioned, which he charged upon his *Dorsetshire estate* ; and then revoked all the devises, &c. in his will in favour of his nephew, *J. G. Harris*, the lessor of the plaintiff, or his issue ; and devised to his nephew *Edward Harris*, in fee, the estates in the county of *Lincoln*, devised by his will to *J. G. Harris*, in fee, but subject and without prejudice to the uses and trusts which, by his will, or by his codicil of the 2d June 1797, preceded the devise to his said nephew *J. G. Harris*, in fee. The testator then devised all his lands in the county of *Lincoln*, which he purchased since he signed his will to his wife for her widowhood, and after her decease to *Edward Harris*, in fee. The testator then declared that the estates, trusts, and powers, by his will, devised in his *Dorsetshire estate* to or in favour of his nephew *Edward Harris*, and his issue, should precede the estates, trusts, and powers, by his will devised in that estate in favour of his nephew *George Harris*, and his issue ; and he devised the same estate accordingly ; and in other respects confirmed his will. The testator, by another codicil of 17th January 1803, ratified and confirmed his will and codicils, so far as the same were not affected by such codicil of the 17th January, which made no disposition material to the present question. The above will and codicils were duly executed and attested to pass real estates. The testator died on the day before-mentioned, leaving *Jane*, his now widow, surviving him. The question for the opinion of the Court was, whether the plaintiff were entitled to recover ? if he were, the verdict was to stand : if not, a nonsuit to be entered.

This case was argued in *Trinity* term last, by *Dampier* for the lessor of the plaintiff, and *Casberd* for the defendant. The argument turned upon this, whether or not, there being no probable reason *a priori* to presume that the devisor had contemplated any distinction between such part of his *Hampreston* estate as lay within the county of *Hants*, and such part as was within the county of *Dorset*, the words of the will were capable of including the former, inasmuch as the description of the subject matter of the devise appeared in the terms of it to be confined to lands purchased of *Lord Arundel*, (which the premises in question were not) or to lands lying in the county of *Dorset*. For the plaintiff, the strict grammatical and legal meaning of the words ; the frequent recurrence of the same description ; the knowledge of the fact by the devisor, that the lands in question were within the county of *Hants* ; and the necessity of express words or necessary implication to pass an estate to

another in disherison of an heir at law,^(a) were principally relied on. For the defendant were urged the highly probable intent of the devisor,^(b) from the connexion and local unity of the premises in dispute with the body of the estate in *Dorsetshire*; the situation of them within the general local ambit^(c) of the latter county, in the legal boundary of which county the great mass of the estate lay; which might give occasion in common parlance to designate the whole as his *Dorsetshire* estate; circumstances which, though debors the will, might be taken in aid to discover his intention, *Doe v. Collins*, 2 Term Rep. 496; the sufficient designation of the premises either as "*hereditaments of and in Hampreston aforesaid*," or as *near Uddens*," (which is a distinct description from the ensuing words, "or elsewhere in the county of *Dorset*"); *Atkins v. Longvile*, Cro. Jac. 50; being in part divided from it only by a lane and rivulet; a construction which, the words admitting of it, ought to be received, *ut res magis valeat quam pereat*; a maxim which governs the construction even of deeds, *Doe v. Packhurst*, 3 Atk. 136, and, *a fortiori*, of wills; and where the words of a grant are sufficiently certain in themselves, words of additional erroneous description will not vitiate the former;^(d) also the frequent republication of his will by the devisor, after new purchases; which shewed his intent not to die intestate as to any part of his property; the power to the trustees to sell, except in *Hampreston*, and to purchase other lands there, or which lay convenient to be holden therewith; and lastly, the revocation of the first devise to the heir at law.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered the opinion of the Court.—The point to be decided in this case, is, whether the several lands, of which the testator was seised at the time of his death, and which lie in parts of *Hampshire*, surrounded by *Dorsetshire*, and were occupied with, and had been laid to lands and farms in *Dorsetshire*, and which were not bought of Lord *Arundel*, passed by Mr. *Greathed's* will: and we are of opinion, that they did not. The case states, that in the year 1795, previous to his marriage with *Jane Glover*, his intended wife, the testator conveyed to trustees to the uses of his marriage settlement, certain lands, by the description of "All that the manor "or lordship of *Hampreston*, in the county of *Dorset*, (part of which manor "lies in *Hampshire*;) and all other his messuages or tenements, farms, lands, "and hereditaments, of him the said *Ed. Greathed* in *Hampreston* aforesaid, "which were lately purchased by him from *H. Lord Arundel*, and conveyed "by the said *H. Lord Arundel* to him the said *Ed. Greathed* and his heirs." And that the testator, having by his will dated the 20th of *March* 1796, recited that by the said settlement he had conveyed his manor of *Hampreston*, in the county of *Dorset*, and his messuages or tenements, farms, lands, and hereditaments, in *Hampreston* aforesaid; *which manor and other hereditaments were then lately purchased by him from Lord Arundel*, to *M. Raper* and *W. W. Bird*, to the uses of that settlement; devised in the following words upon which the question turns. "I give and devise unto *W. Wilberforce* and *W. W. Bird*, and their heirs, the said manor and lordship, messuages or tenements, and other hereditaments of and in *Hampreston* aforesaid, and all and "singular other the manor or lordships, messuages, lands, tenements, farms, "and other hereditaments, situate, lying, and being in or near *Uddens* aforesaid, or elsewhere, in the County of *Dorset*; and all and singular the manors or lordships, messuages, lands, tenements, and hereditaments, situate, "lying, and being in the county of *Lincoln*, of which I, or any persons in "trust for me, am or are seised." The will then proceeds to state the uses to

(a) *Gardner v. Sholdon*, Vaugh. 262, and *Doe v. Child*, 1 New Rep. 345.

(b) *Moore v. Heaseman*, Willes, 141, and *Roe v. Wickett*, ib. 309.

(c) *Shep. Touch.* 87. pl. 3, and *Lane v. Lord Stanhope*, 6 Term Rep. 352.

(d) *Plowd.* 192. Bro. Abr. Annuity, pl. 3. Grants, pl. 4. Dy. 87. a. pl. 101. And *Goodtitle v. Paul*, 2 Burr. 1089, and 1 Blac. Rep. 255.

which the trustees were to be seised thus; viz. "As to all and singular the "manors or lordships, messuages, lands, tenements and hereditaments, in the "county of *Dorset*," to certain uses, not necessary to repeat, inasmuch as nothing depends upon them; and the plaintiff, in consequence of the subsequent codicils, would not be entitled to recover, supposing the lands in question to have passed by the will to the trustees, *Wilberforce* and *Bird*. Having thus shortly adverted to all that is stated in this case, upon which the question between the parties is to be decided; for a great deal of irrelevant matter has been introduced into it; I will state the reasons on which our opinion is founded, viz. that the devise is confined to the lands bought of Lord *Arundel*, or lands lying in the county of *Dorset*. By the first part of the devise, the testator, having recited the settlement, on his intended marriage, of the manor of *Hampreston*, and other lands lately bought of Lord *Arundel*, confines the devise to what he had so bought, by using the words *said* manor, and hereditaments *aforsaid*: and if we were to hold that this devise would pass lands not bought of Lord *Arundel*, (and those in question were not bought of him,) we should alter his expressions, render the recital useless, and comprehend that which he has in terms excluded. Thus the question stands on the first part of the devise. The latter part of it is in these terms; "And "all and singular other the manors, &c. and other hereditaments, situate, lying, and being *in or near Uddens aforsaid, or elsewhere, in the county of "Dorset*;" which words, we think, confine the devise to lands in *Dorsetshire*; for had the testator meant, that all his lands *near Uddens* should pass, in whatever county they might happen to be situate, it would have been sufficient to have said *near Uddens aforsaid*, to ascertain which the county was not necessary: and the natural construction of the words, "*or elsewhere in the county of Dorset*" is to restrain the devise to lands in *Dorset*; as if the expression had been, *all other lands in the county of Dorset, near Uddens aforsaid, or in any other place in that county*. And had the testator, according to the argument for the defendant, used the words *near Uddens*, as descriptive of the lands he meant to devise, without regard to the county, he must have meant them as descriptive of some lands, which, from their proximity to *Uddens*, might be distinguished from others more remote; but such argument is not consistent with the defendant's claim to ALL. But it does not seem to us, that the testator contemplated any other distinction between the lands he meant to devise, but their lying in the county of *Dorset* or of *Lincoln*. In thus construing the will, we shall give it, as we conceive, its natural and proper sense, collecting the intent of the testator from the words he has used, as applied to the subject matter; without travelling into matters collateral and foreign to the will, which ought not to be. And in putting upon it the instruction we have done, we guide ourselves by the rules we find laid down for the interpretation of written instruments. In *Plowden*, 191, this rule is laid down; "There is a diversity where a certainty is added to a thing which is uncertain, and where to a thing certain. For if I release all my right in *all my lands in Dale*, which I have by descent on the part of my father;" and I have lands by descent on the part of my mother, but no lands by descent on the part of my father; there the lease is void. But if the release had been of *Whiteacre in Dale*, which I have by descent on the part of my father; and I had it not by descent on the part of my father, but otherwise: yet the release is good: for the thing was certainly expressed by the first words, in which case the addition of another certainty is not necessary, but superfluous. Now in the question before us, in the latter part of the devise, there is no special description or name of the lands devised, so as to make the addition of something to ascertain the lands not necessary but superfluous: and if they may have that effect, they ought not to be rejected. And even in cases where you give a thing a proper name, Lord *Bacon* says, in his 13th Maxim, that "the falsity of addition or demonstration doth not hurt; yet nevertheless if it stand

doubtful upon the words, whether they import a false reference and demonstration, or whether they be words of restraint that limit the generality of the former name, the law will not intend error or falsehood." As to the argument founded on the circumstance of the lands in question being in parts of *Hampshire*, lying within the general boundary of *Dorset*; the answer given by the counsel for the plaintiff, we think, is a good one, namely, that where lands are spoken of as lying in a county, it is meant that they are a *part* of that county. For these reasons we are of opinion there should be judgment for the plaintiff. (a)

Rickman v. Studwick.

8 East, 105. Nov. 6, 1806.

Volunteer drill-serjeants, &c. though subject to the regulations of the mutiny act for trial and punishment by volunteer courts martial, according to the st. 44 Geo. 3. c. 54. s. 21, are not privileged from arrest for debts under 20*l.* as regular soldiers.

UPON a rule *nisi* for discharging on common bail the defendant, who had been arrested for a debt under 20*l.* the question was, whether a drill-serjeant in a volunteer corps, being sworn and receiving constant pay, as described in the stat. 44 Geo. 3. c. 54. s. 20, and 21, were entitled to the privilege from arrest given to soldiers in the regular army by the mutiny act? *Bowen*, in support of the rule, contended for the affirmative; because being put on the same footing, and subjected by the 21st section of the first-mentioned act to the same trial and punishment, it must have intended to give him the same privilege; which consequence *Burrough*, contra, denied; and referred to the 23d section, which expressly subjects volunteer corps, in certain cases only, to the discipline and provisions of the mutiny act.

And of this latter opinion was the Court: Lord *Ellenborough*, C. J. saying, that the mutiny act attached only on persons *enlisted*: But drill-serjeants, &c. in volunteer corps are, by the act in question, only subject to the regulations of the mutiny act so far as relates to trial and punishment by court martials composed of yeomanry or volunteer officers, for the purpose of securing their obedience: but the mutiny act does not extend to them for other purposes than those there mentioned.

Rule discharged.

Cathrow v. Hagger.

8 East, 106. Nov. 26, 1806.

An affidavit to hold to bail, only stating that the defendant was "*indebted to the plaintiff for goods sold and delivered, (not saying by the plaintiff to him the defendant,)*" is insufficient.

THE affidavit to hold the defendant to bail stated that he was "*indebted to the plaintiff for goods sold and delivered to him the defendant,*" not stating *by the plaintiff*; upon which a rule *nisi* having been obtained for discharging the defendant out of custody on filing common bail, for the insufficiency of the affidavit,

Walker shewed cause; and said that the defendant being sworn to be *indebted to the plaintiff* for the goods, they must have been sold and delivered by him; and he distinguished this from *Perks v. Severn*, 7 East, 194, where it was only sworn that the defendant was *indebted to the plaintiff for goods sold and delivered*, not saying sold, &c. *to the defendant*, and therefore they might have been furnished upon the credit of a third person.

Lawes, contra, relied on the case mentioned; and said that here the goods

(a) Vide *Tutteshan v. Roberts*, Cro. Jac. 22, and *Norris and Campion's case*, Dy. 292. a.

may have been sold *by another*, and the debt assigned to the plaintiff: and that, as no affidavit in answer could be made, the affidavit to hold to bail ought to be positive, and not argumentative.

The Court, thinking the objection well founded for the reason stated, made the Rule absolute.(1)

The King v. Gibson.

8 East, 107. Nov. 26, 1806.

A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him.

THE defendant was indicted at the sessions for an assault by the name of *Benjamin Gibson*, to which he pleaded a misnomer, in his Christian name, that it was *Benoni*, and not *Benjamin*: and issue being taken by the replication on that fact, at the trial a verdict was found for the prosecutor; and the indictment being removed by *certiorari*, at the instance of the prosecutor, into this court, a rule was given by him in the present term for final judgment, and the defendant served with notice to appear and receive judgment; whereupon the defendant obtained a rule, "upon reading the record in this prosecution, calling on the prosecutor to shew cause why the defendant should not be at liberty to plead *not guilty* to the indictment."

Richardson shewed cause, and contended that peremptory judgment must be given upon a plea in abatement in misdemeanor found against the defendant, and not merely a judgment to answer over to the offence. The distinction is between misdemeanor and felony: in the latter case, if a plea in abatement be found against the defendant, he shall plead over to the felony; but this is a privilege allowed only in *favorem vite*, and does not apply to cases where life is not in jeopardy.(a) In strictness, indeed, if the prisoner plead in abatement, he shall at the same time plead over to the felony; otherwise, the prosecutor may move the court to enforce him to do so, or may reject the plea; though if it be received, it is not bad on demurrer for want of pleading over to the felony, *Orbell v. Ward*, Carth. 56; nor is the defendant concluded by such omission; but having pleaded both pleas, they shall be tried by the same inquest, which is to pass on the prisoner and is ready at the bar.(b) And *Hawkins*(c) says, that in these respects an appeal or indictment of felony differs from "appeals of mayhem and all civil actions whatever," (except assizes of mortdancestor, &c.), where "if a plea in abatement triable by the country be found against the defendant, he shall not be suffered afterwards to plead any new matter, but final judgment shall be given against him." Now, as the only instance mentioned of pleading over is in case of felony, it is evident that he meant to class misdemeanors with appeals of mayhem and civil actions: and in that sense must be understood what *Hawkins* adds in the same section, "Also it seems agreed, that in all other actions, except those above-mentioned, if a defendant, together with a plea in abatement, plead also a plea in bar, or the general issue, he waives the plea in abatement, and the plea in bar or general issue only shall be tried." For which he cites many authorities in the margin; amongst others, *Kirton v. Williams* and others,(d) where in an appeal of mayhem such double pleading was disallowed, as not admitted in any case but where life was in jeopardy, and then in *favorem vite*. And *Hawkins* refers to the same law in other passages, 2 Hawk. ch. 25. s. 12. 150, as applicable to pleas in abatement to indictments.

(1) Vide *Taylor v. Forbes*, 11 East, 315.

(a) 2 Hale, P. C. 239, cites 22 Ed. 4. 39. b, and 9 H. 4. 1. b.

(b) 2 Hale, P. C. 238, 9. 2 Hawk. P. C. ch. 23. s. 123.

(c) Ibid. and vide *Finch's Law*, 385.

(d) Cro. Eliz. 495. Noy, 34. And Poph. 115.

Raine and *Littledale*, contra, (in answer to a question from the Bench) admitted that they had not found any express adjudication of the right of pleading over in misdemeanor after a plea in abatement found by the country against the defendant; but they said, that there was no adjudication to the contrary: and therefore, in the absence of all express authority upon the subject, recourse must be had to legal analogy; and that is stronger between misdemeanor and felony than between misdemeanor and civil actions. The appeal of mayhem, though penal in its consequences, is in its form a mere civil proceeding; and so *Hawkins* evidently considers it when he speaks in the section referred to, 2 Hawk. ch. 23. s. 128, of "appeals of mayhem and all other civil actions:" but the form of proceeding in misdemeanor is the same as in felony. So *Hawkins* applies the rule of pleading over, after pleading in abatement to all felonies generally, and not merely to those which are capital; and misdemeanors transportable are as penal as clergyable felonies. The original source of the distinction in *favorem vitæ* may be traced to the year-book, 22 Ed. 4. 39. b, which is quoted by Lord *Hale* and others for this purpose; and reference is also made to it in Brooke's Abr. Bro. Abr. Appell. pl. 115. Now that was an appeal of death; and the expression of *in favorem vitæ* was used by *Fairfax* as an argument for the pleading over, and not as derived from any principle of the common law limiting its application to cases of life and death. And as it is admitted that in assize of mortdancestor, 1 Roll. Abr. 273, novel disseisin, nuisance, and *juris utrum*, such double pleading is allowed, there is no reason why the same privilege should not extend to cases of misdemeanor; though, for what reason does not appear, it does not extend to appeals of mayhem. And they referred to a precedent in Trem. P. C. 188. *The King v. The Earl of Devon*; which was an information against the Earl for challenging Mr. *Culpepper* in the King's palace, and assaulting and wounding him there; to which he pleaded his privilege as a peer of parliament not to answer for such offence in any other than the Court of Parliament during its sitting, and for the usual time of privilege, i. e. for 40 days after prorogation: and because the information was exhibited against him within the 40 days, which were not then passed, he pleaded to the jurisdiction. To this there was a demurrer; and the Court gave judgment against the defendant, to plead over to the information.

LORD ELLENBOROUGH, C. J. The general principle of the common law is against pleading over after a plea in abatement found against the defendant; but there are several privileged cases, which are admitted by way of exception, and one of them is in case of felony, *in favorem vitæ* and that extends to felony generally; because at common law the judgment is of death, though clergy may be demandable. Only one instance has been mentioned of the same privilege allowed in a case of misdemeanor, and that is the precedent referred to in *Tremaine*, which may have passed in the mere exercise of a discretionary power by the Court, on account of the magnitude of the punishment for striking another in the King's palace, being no less than the loss of the offender's hand: But at any rate, the general point does not appear to have been presented to the notice of the Court in judicial debate; but it is cited merely from an entry in a book of entries.(a) On the other hand, the exception in case of

(a) His lordship afterwards asked whether any notice were taken of this case in the state trials: to which no answer was then given. But an account of it is to be found in 11 St. Tr. 133, taken from the Earl of *Warrington's* papers; and it is also reported in Comb. 49. There is some variation in the two statements: according to the former, after the Court had overruled the Earl's plea, and required him to plead to the information in the next term, he did accordingly then appear and plead guilty, and the Court awarded him to pay a fine of 30,000*l.* and be committed to the K. B. till payment, &c. which proceedings were afterwards declared to be illegal by the House of Lords. But from *Comberbatch's* Report, E. 3. J. 2, which is inaccurately expressed, it should seem that the advice of the Court to the defendant to plead in chief was before his plea of privilege was formally put in; though insisted upon in argument both by the defendant

felony, as founded in *favorem vite*, is expressly recognized by Lord *Hale*, who derives it from the case in the year books; and it is since adopted by *Hawkins*, though of less authority than Lord *Hale*, and stands also upon the case in Popham's Reports. When therefore the books agree in considering felony as an excepted case in *favorem vite*, they in effect exclude all other cases not also excepted: and if persons indicted for misdemeanors had been considered as entitled to the same privilege of pleading double, there must have been many instances of their having availed themselves of it to be met with in the books, many more probably than in cases of felony.

GROSE, J. If the privilege of pleading over had been general, we should not have heard of the exceptions.

LAWRENCE, J. referred to 2 Hawk. ch. 31. s. 6 & 7, which says, that "Howsoever the law may stand in relation to a general demurrer concluding in bar of an appeal or indictment, as in common demurrers in civil actions, &c. which admits the fact, &c.; it hath been adjudged, that if an appellee demur in law to an appeal by reason of the insufficiency of the declaration, or generally demur to the declaration, with a conclusion, *et petit judicium de narratione illa, et quod narratio illa cassetur*, &c.; such demurrer shall not conclude him from pleading over to the felony, either at the same time with the demurrer, or after it shall be adjudged against him. But it seems, that in criminal cases, not capital, if the defendant demur to an indictment, &c., whether in abatement or otherwise, the Court will not give judgment against him to answer over, but final judgment."

LE BLANC, J. The general rule is against the defendant; and the current of authorities shews that pleading over is only allowed in case of felony, in *favorem vite*. (1)

Rule discharged.

Lowther v. The Earl of Radnor and Another.

8 East, 113. Nov. 27, 1806.

The stat. 20 G. 2. c. 19, giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers" employed for any certain time, or in any other manner, respecting wages within certain sums, extends to *labourers of all descriptions* and not merely in the particular trades or business there enumerated: and consequently includes wages earned by a *labourer* who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. The party appealing to the sessions, is not thereby concluded from afterwards disputing its jurisdiction in the particular case. Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction, though the real facts of the case might not have supported such complaint, if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend.

IN trespass for breaking and entering the plaintiff's close, and taking his

and his counsel. "But notwithstanding this, (the Report states) the defendant put in his plea of privilege; to which there was a demurrer: and afterwards the plea was over-ruled by the Court. And he was fined 30,000*l.* in Trin. 3. J. 2." It appears, however, from the record of this case, (*ex relatione Magi. Dealtry*) that the Court gave judgment upon the plea of privilege, that the defendant should answer over; upon which he immediately pleaded not guilty to the information; and process issued to summon a jury to try that issue; but on the return of the process the Earl withdrew his plea, and confessed himself guilty. Whereupon the Court sentenced him to give security for his good behaviour, and to pay a fine of 30,000*l.* and committed him, till payment, to the custody of the marshal in execution. But in M. 3. J. 2, the Attorney-General acknowledged satisfaction of the fine and of giving security; upon which the Court discharged him out of custody. In *Raz v. Johnson*, 6 East, 602, there was judgment of *respondens oster* after a plea to the jurisdiction in misdemeanor over-ruled upon demurrer.

(1) [See acc. Archbold's Criminal Pl. & Ev. 48.—W.]

goods (which was for a distress) at *Tilshead*, in the county of *Wilts*, the defendant pleaded the general issue; and at the trial at *Salisbury* in *March* 1806, before *Le Blanc*, J. a verdict was found for the plaintiff, damages 6*l.* 13*s.* 6*d.* subject to the opinion of this Court on the following case. On the 27th of *Nov.* 1804, the two defendants, justices of the peace for the county of *Wilts*, made and signed the following order. “*Wilts*, to wit. To *Thomas Lawes*, one of the tything men of *Tilshead*, in the county of *Wilts*, &c. Whereas *James Sopp* of *Shrewton*, in the county of *Wilts*, labourer, hath complained unto *J. T. B.* Esq. one of H. M. justices of the peace in and for the said county of *W.* that *G. Lowther*, Esq. residing at *T* in the said county, refused to pay unto him, the said *J. Sopp*, 4*l.* 13*s.* 6*d.* for wages justly due unto him for work and labour done by the said *J. Sopp*, and by *T. Franklin*, in the service of the said *G. Lowther*, by digging and steaning part of a well at the said parish of *T*.: And whereas on the 13th of *Nov.* inst. the said *J. T. B.* by a precept under his hand and seal, directed to the aforesaid *T. Lawes*, &c. did require them to summon the said *G. Lowther* to appear before him, *J. T. B.* and such other of his majesty’s justices of the peace as should be present at *Fisherton Anger*, in the said county, on *Tuesday* the 20th of *Nov.* inst. to answer to the complaint of the said *J. Sopp*, and to shew cause why an order should not be made on the said *G. Lowther* for payment of the aforesaid sum: And whereas the said *G. Lowther* was, on the 16th of *Nov.* inst., duly served with the said summons by the said *T. Lawes*, but hath neglected to appear to answer the said complaint, and hath not paid to the said *J. Sopp* the said 4*l.* 13*s.* 6*d.* or any part thereof, and hath not shewed to us any sufficient cause why the same should not be paid: We, whose hands and seals are hereunto subscribed and set, two of his majesty’s justices of the peace, &c. being present at the time and place above appointed for the hearing of the said complaint, having duly examined the said *J. Sopp*, upon oath, touching the truth of the said complaint, and upon consideration thereof, do adjudge the said complaint to be true, and that the said 4*l.* 13*s.* 6*d.* is justly due and owing unto him, the said *J. Sopp*, from the said *G. Lowther*. And we do hereby also adjudge and order the said *G. Lowther* to pay, or cause to be paid unto the said *J. Sopp*, 4*l.* 13*s.* 6*d.* which appears to us to be just and reasonable to be paid by him, the said *G. Lowther*, to the said *J. Sopp*; as and for his wages as aforesaid. And we do hereby require you, &c. forthwith to give notice to the said *G. Lowther* of this our adjudication and order, and to certify to us what you shall have done concerning the premises when duly required, that in default of payment such other proceedings may be had therein as the law requires, &c.” Mr. *Lowther* appealed to the *Wilts* quarter sessions against the order; and the appeal was heard at the *Epiphany* sessions 1805, when the order was affirmed by the sessions with 40*s.* costs to be paid by Mr. *Lowther* to *J. Sopp*. On the 19th of *April* 1805, the defendants made and signed the following warrant of distress. “*Wilts*, to wit. To *Tho. Lawes*, &c. Whereas we, the Earl of *Randor* and *Wilm. Eyre*, Esq. two of his majesty’s justices, &c. by an adjudication and order under our hands and seals, bearing date the 27th of *Nov.* last, did, amongst other things, upon the oath of *J. Sopp* of *S.* in the said county, labourer, adjudge and order *G. Lowther*, Esq. residing at *T* in the said county, to pay, or cause to be paid, unto the said *J. Sopp* 4*l.* 13*s.* 6*d.* which appeared to us, the said justices, to be just and reasonable to be paid by the said *G. Lowther* to the said *J. Sopp*, as and for his wages, (to wit) for work and labour done by the said *J. Sopp* and by *T. Franklin*, in the service of the said *G. Lowther*, by digging and steaning part of a well at the said parish of *T*, as upon reference to the said adjudication and order will more fully appear: And whereas the said *G. Lowther* was, on the 5th of *Dec.* last, personally served with the said adjudication and order, but hath neglected to pay the said *J. Sopp* the said 4*l.* 13*s.* 6*d.*, and hath not paid the same, or any part thereof: And whereas, at the general quarter ses-

sions, &c. held at *Devizes*, in and for the county of *Wilts*, on *Monday* the 14th of *Jan.* last, the said *G. Lowther* did enter and prosecute his appeal against the said adjudication and order, but the same was confirmed by the said Court; and the said Court did order and award the said *G. Lowther*, on notice thereof, to pay, or cause to be paid unto the said *J. Sopp*, 40s. for the costs, &c. (of the appeal.) And whereas it appears to us, that the said *G. Lowther* was, on the 19th of *Feb.* now last past, duly served with the said order of the said sessions, and payment of the said several sums of 4*l.* 13s. 6*d.*, and 40s. hath been demanded of him by the said *J. Sopp*, but he hath refused to pay, and hath not paid the same, or any part thereof: these are therefore to command you forthwith to make distress of the goods and chattels of the said *G. Lowther*, &c. and thereout to pay the said two several sums of 4*l.* 13s. 6*d.* and 40s. to the said *J. Sopp*, &c." The warrant was delivered to *Lance* the tythingman of *Tilshead* to be executed; who, on the 24th of *April* 1805, distrained and sold goods of the plaintiff to the value of 8*l.*, out of which he paid *Sopp*, 6*l.* 13s. 6*d.* in pursuance of the warrant, and returned the surplus to the plaintiff. "*Steaming a well*" means lining it with stones and mortar. And it was proved, that *J. Sopp* had, on other occasions been employed by the plaintiff as a labourer in husbandry. Notice of the action was given to the defendants, and the action was regularly brought.

The case first came on to be argued in *Trinity* term last, when the Court thinking it was defectively stated, these facts were afterwards added. That the work was performed under a contract between the plaintiff and *Sopp*, by which the latter undertook to dig the well of a sufficient depth to supply the plaintiff's cattle with water, and for which, when it was deep enough to give a supply of water, he was to receive two shillings per foot. In the execution of the work, *Sopp* was to employ whom he pleased to assist him, but the money was to be paid to *Sopp* alone. *Sopp* had before done other work for the plaintiff, by which he was paid by the piece, and not by the day.

The questions stated for the opinion of the Court were, 1st, Whether the justices making the original order, or the quarter sessions, had jurisdiction to make the said orders, or either of them? If they had not, then, 2dly, Whether the plaintiff had precluded himself from bringing this action by appealing to the quarter sessions against the original order?

Jekyll, for the plaintiff, contended, 1st, that the justices had no jurisdiction to make the original order. But if they had, 2dly, that they exceeded their jurisdiction, by ordering the money which had been earned by *Sopp* and *Franklin* to be paid to *Sopp* alone. 3dly, That the plaintiff was not precluded from bringing his action by having appealed to the Sessions. As to the first and principal point, the stat. 20 Geo. 2. c. 19, (a) is confined to servants in husbandry, and to the particular trades there mentioned, and to labourers assisting in such trades, though not regularly retained in or denominated by them. If the general words had been intended to extend to all labourers generally, it would have been nugatory to specify particular persons. Now the sort of work and labour stated to have been performed by *Sopp* was that of a brick-layer or mason, and they are not mentioned in the act. It was to dig and steam a well, by contract, at so much a foot, and to employ workmen under him; which is no part of the employment of a servant in husbandry, or of any of the workmen specified in the act; nor is it stated that *Sopp* was a person of either of those descriptions. And though it be stated, that the well

(a) The statute gives jurisdiction to one or more justices of the peace to hear and determine disputes between "masters or mistresses, and servants in husbandry, who shall be hired for one year or longer, (extended by 31 Geo. 2. c. 11. s. 3, to all servants in husbandry, though hired for less time than a year) or between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and other labourers employed for any certain time, or in any other manner," "to make order for payment of wages, &c. not exceeding 10*l.* with regard to any servant, nor 5*l.* with regard to any artificer, &c. potter, or labourer."

was to be made for the use of the cattle; that will no more make him a servant or labourer in husbandry, than one who makes ploughs or other farming utensils. He referred to *Regina v. London*, Salk. 442, and 6 Mod. 204; *Rex v. Bampton*, (a) and *Rex v. Hulcott*, 6 Term Rep. 583, to shew that neither the stat. 5 Eliz. c. 4, nor the stat. 20 Geo. 2. c. 19, in *pari materia*, though containing the general words, had been considered to extend to labourers in general, but only to servants or labourers in husbandry, or in the classes particularly mentioned. 2dly, He argued upon the excess of jurisdiction by the magistrates in awarding the whole of the money, part of which was earned by *Franklin*, to be paid to *Sopp*; supposing that the money was the earnings of a labourer, so as to bring the case within the general words of the statute: for, properly, the wages earned by one man cannot be due to another, except under a contract. 3dly, If the magistrates had no jurisdiction under the act, the appeal of the plaintiff could not give them any; because a party may appeal upon that very ground, in order to relieve himself from further question or trouble by having the order quashed. Not even consent of parties can give jurisdiction where none is given by law, *Rex v. Commissioners of Sewers, Somerset*, 7 East, 80. [Lord *Ellenborough*, C. J. said, that he might take that for granted: if there were no original jurisdiction in the magistrates making the order, the appeal would not give it.]

In the course of the argument, both now and last term, the Court expressed great doubt how far in this form of action, which charged magistrates as trespassers for an act done by them in the exercise of their judicial capacity, they could take into consideration any other facts than those which appeared to have been laid before the magistrates at the time of the order made. And upon the present occasion, Lord *Ellenborough*, C. J. said, that the facts stated in the case were not stated as facts appearing before the magistrates at the time; and that in order for the plaintiff to avail himself of them, it should have appeared that the same facts were stated to the magistrates, before whom he had notice to appear. For how otherwise, he asked, could the magistrates be affected as trespassers, if the facts stated to them upon oath by the complainant were such whereof they had jurisdiction to inquire, and nothing appeared in answer to contradict the first statement? *Grose*, J. My doubt is, whether in this case we can take notice of any thing but what appears upon the face of the order. *Lawrence*, J. If the magistrates made an order against the evidence laid before them, the party injured would have another sort of remedy against them. But here it appears that a certain complaint was made to them on oath, which, as it appears on the face of the order, is valid in law; and of this the plaintiff had due notice. If then he would complain of what was done upon it, he ought to have shewn that the facts on which he now relies were proved before the magistrates. But he cannot make the trespassers by shewing that the real facts of the case will not support the complaint, unless such facts were proved before them at the time.

Dampier for the defendants. 1st, Upon the face of the order it appears that *Sopp*, a labourer, complained to the magistrates upon oath, that a certain sum due to him for wages was withheld from him by the plaintiff. What evidence was given before the magistrates is not stated; but as they adjudge the money to be justly due to *Sopp*, it must be presumed that he made good his complaint; and the plaintiff, though summoned, offered no contradiction to it. He then argued from the words of the statute 20 Geo. 2. c. 19. s. 1, that it extended in terms to labourers of all descriptions; and that the reason of the thing extended to them. Labourers in husbandry are not mentioned specifically; and yet the act is admitted to include them. The act only

(a) Cald. 11. This reference was principally to the learned Editor's note (c) p. 14, where the subject is much considered, and to Dr. *Burn's* opinion there stated, that the word *Labourers* in the statute ought to be restricted to labourers of the classes and denomination enumerated.

mentions *servants in husbandry*, between whom and *labourers* there is a distinction; for in the case of the former the magistrates have jurisdiction to the extent of 10*l.*, but only of 5*l.* in the case of *labourers* of any description. And the stat. 31 Geo. 2. c. 11. s. 3, reciting a doubt whether the words in the former statute, "any labourers employed for any certain time or in any other manner," extended to *servants* in husbandry hired for a less time than one year, extends the provision to *all servants* in husbandry, though hired for less time than one year. It is a great advantage to this class of persons to have speedy and cheap justice administered at their own doors; and therefore so beneficial an act ought rather to be extended than confined by construction; and the policy of the law is to give effect to the general words. The reason why potters, glassmen, and others are particularly mentioned might be, because some of those descriptions of workmen may not be considered as classing with *labourers*, commonly so called. 2dly, It is not inconsistent with the condition of a labourer that he should contract to do the work by the piece or great, and therefore should employ another labourer under him; many important operations in husbandry are performed in this manner; threshing, fencing, ditching, mowing, reaping. The digging and steaming of a well for cattle may well be done by a labourer in husbandry. As to the 3d point made by the plaintiff's counsel, he abandoned it on an intimation by the Court that the objection could not be supported.

LORD ELLENBOROUGH, C. J. at the conclusion of the argument some days ago observed, that the construction of a statute of such general utility and extensive application, affecting the relief of the most numerous class of subjects by the magistrates in their daily practice, and making one of a body of laws upon the same subject, required to have the most mature consideration given to it, in order to make their decision conform, as much as the words of the act would admit, to the general policy of the law upon this subject. The Court would therefore deliver their opinion on another day. And now his Lordship gave judgment.

The question arising on this special case depends on the terms of the complaint made to the magistrates, as recited in the order of the two magistrates of the 27th of Nov. 1804; and how far the terms of that complaint bring the complainant within the provisions of the statute 20 G. 2. c. 19. The complaint is in these words, "Whereas *Jas. Sopp of Shrewton* in the county of *Wilts*, labourer, hath complained unto *John Thomas Batt, Esq.* one of H. M. justices of the peace in and for the said county of *Wilts*, that *G. Lowther, Esq.* residing at *T.* in the said county had refused to pay unto him the said *J. S.* 4*l.* 13*s.* 6*d.* for wages justly due unto him for work and labour done by him the said *J. S.* and *T. Franklin, in the service* of the said *G. Lowther, by digging and steaming* part of "a well at the said parish of *T.*" This complaint must be taken to be true in the terms of it; no evidence appearing to have been laid before the magistrates to contradict or vary it, and they having adjudged the same to be true. By this it appears that *Sopp* was a labourer; for he is described as *J. Sopp of Shrewton, labourer*; and that his demand was for wages due to him, for work and labour done by himself and another person, *Thomas Franklin*; by which must be understood that *Sopp* was employed to do the work either by the day or the piece, and that *Franklin* assisted *Sopp* in the work, under the retainer of *Sopp*, and not of Mr. *Lowther*: a common practice with labourers as well in husbandry as in other business. Is *Sopp* then such a labourer as is by the statute 20 G. 2. c. 19, subjected to the jurisdiction of the justices of the peace, and of course entitled to the benefit of that jurisdiction, to recover his wages, being under 5*l.*, by their summary process? The stat. 20 G. 2. c. 19, begins by reciting, that the laws now in being for the better regulation of servants, and for the payment of wages to them, and to artificers, handicraftsmen, and labourers, are insufficient and defective; and for remedy enacts, that all complaints,

differences, and disputes which shall happen and arise between masters or mistresses, and servants in husbandry who shall be hired for one year or longer, or which shall happen or arise between masters and mistresses, and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and *other labourers, employed for any certain time, or in any other manner*, shall be heard and determined by one or more justice or justices, although no rate or assessment of wages has been made that year by the justices. The stat. 31 G. 2. c. 11. s. 3, recites the stat. 20 G. 2. c. 19, and that doubts had arisen whether the words, "*any labourers employed for any certain time, or in any other manner*," extends to servants in husbandry hired for a less time than a year; and for obviating the said doubts enacts, that the said act, and every clause and matter therein contained, shall extend to all servants employed in husbandry, though hired for a less time than a year. In the argument of this case, it was contended, that *Sopp* did not come within the meaning of the act of parliament 20 G. 2. c. 19, because he was not a servant in husbandry, nor a servant or labourer in any of the trades, callings, or employments enumerated in that act: and that the words used in the act "*other labourers employed for any certain time, or in any other manner*," meant labourers in any of the enumerated trades only, and not labourers generally. With the first part of the argument, that he is not to be taken as a servant in husbandry, we agree: because he is not stated to be so in the order or complaint; and we cannot intend any thing to give the justices jurisdiction beyond what appears in the order. *Rex v. The Inhabitants of Hulcott*, 6 Term Rep. 583. But we cannot accede to the latter part of the argument, that the operation of the statute is to be confined to labourers in the several enumerated employments. The most obvious construction is not so to confine it; and no case has been stated where the construction has been so confined. The mischief recited in the preamble of the act is *general*, viz. that the laws in being for the better regulation of servants, and the payment of wages to them, and to artificers, handicraftsmen, and *labourers*, are insufficient. The remedy provided by the act is, that all differences between masters or mistresses and servants in *husbandry*, who shall be hired for a year or longer; (These words certainly restrain the operation of the remedy, as to servants, to those in husbandry only, and to such as are hired for a year or longer: the act then proceeds,) "or (differences) which shall happen or arise between masters and mistresses and artificers, handicraftsmen, miners, colliers, keelmen, pitmen, glassmen, potters, and *other labourers* employed for any certain time, or in any other manner." Now, unless these words, "*other labourers*," mean to comprehend a different description of persons from those before particularly mentioned, it is difficult to account for their insertion at all; but applying them to *other labourers* in any other trade or business, the sense will be perfect, and each word will have its meaning. But it may be said, that if such an extensive construction be but on these last words of the sentence, the former part, specifying certain trades, becomes nugatory. That however will not follow; for artificers, handicraftsmen, miners, &c. do not necessarily or properly fall under the denomination of *labourers*; there being, as I take it, a known distinction between a journeyman in any art, trade or mystery, or other workmen employed in the different branches of it, and a *labourer*. It does not appear to us to be an objection to this construction, that by other acts of parliament passed subsequent to the 20 G. 2, workmen or labourers in other particular trades or manufactures, or labourers generally, are subjected to certain regulations which appear to clash with some of the provisions of this act. As the stat. 22 Geo. 2. c. 27. s. 9, for regulating certain manufactures therein mentioned; and the stat. 6 Geo. 3. c. 25, for the better regulating apprentices and persons working under contract; and other statutes which may be pointed out. The true answer seems to be, that at the time of passing one act, the legislature has not always had every other act containing provisions bearing on the

same subject brought under its consideration. The act now under our consideration appears to have had for its object the affording to certain servants and workmen, and to labourers in general, a speedy, easy, and cheap mode of recovering their wages when they amount to a small sum; and to masters an easy method of correcting trifling misdemeanors and ill behaviour in their workmen and labourers. These benefits are by the words of the act extended to servants in husbandry, to workmen in different branches of trade, and to other labourers employed for any certain time or in any other manner. The latter words are as general as may be; and we cannot find any reason in law or policy to say that they do not comprehend the case of *Sopp*, as stated in the order of the two magistrates. For these reasons we are of opinion, on the questions submitted to us by the special case, that the justices making the original order had jurisdiction to make that order; and of course that the quarter sessions had jurisdiction to make the order on the appeal. The consequence is, that the postea must be delivered to the defendants.

Earle and Others v. Rowcroft.

8 East, 126. Nov. 27, 1806.

Barratry is any fraudulent or criminal conduct against the owners of ship or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners; although it may not be done with intent to injure them, or to benefit at their expence the master or mariners. And therefore where a master had general instructions to make the best purchases with dispatch, this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous.

THIS was an action on a policy of insurance, dated 28th *January* 1804, on the ship *Annabella*, at and from *Liverpool* to the coast of *Africa*, during her stay and trade there, and to the port of sale in the *West Indies*, with liberty to exchange goods, &c.; and the plaintiff averred a loss by barratry of the master. It appeared at the trial at *Guildhall*, that the master, who was also supercargo, on his arrival off *Cape Coast Castle*, a *British* settlement on the coast of *Africa*, let go an anchor, and began to trade there for two days; but receiving intelligence that he could barter his goods for slaves more expeditiously and advantageously at *D'Elmina*, a *Dutch* fort about 7 miles to windward, he weighed anchor and proceeded to this latter place, which had the *Dutch* flag flying and guns mounted, where he exchanged his goods, consisting amongst other things, of muskets and gunpowder, with the *Dutch* governor and another resident there, for slaves: *Holland* being at that time at war with *Great Britain*, and he having a letter of marque on board against the *French* and *Dutch*. After taking on board a number of slaves, the captain, who was then on shore at *D'Elmina*, receiving information that an *English* frigate was in sight, sent a note on board the *Annabella*, directing her to sail immediately from thence to *Cape Coast*, to prevent, as he expressed himself, mischief; but before she reached the latter place she was pursued and captured by the *English* frigate, and sent to *Jamaica*, where she was condemned as prize, for having traded with the enemy. It appeared further, that it had been usual to keep up a trading intercourse, in boats and small craft, between the *English* and *Dutch* settlements on this part of the coast, even in times of war between the mother countries; and that the captain's object in going to *D'Elmina* was to complete his cargo as cheaply and expeditiously as he could. It was admitted, that he had no particular instructions to go there, but that he was directed generally to make the best purchases with dispatch. It was also in proof, that when the ship was about to go to *D'Elmina*, the surgeon asked

the captain if there was no impropriety in going there; to which he answered that they should be gone soon, and nobody would know it. And also, that besides his usual pay as captain, he had a commission on purchases and sales, which he was entitled to receive at the end of the voyage. Lord *Ellenborough*, C. J. was of opinion, that this trading with the enemy by the captain, without the authority of his owners, though intended principally for their benefit, being in contravention of his duty to them, and subjecting their property to confiscation, was barratry; on which the plaintiff was entitled to recover in this action: but the case being new in specie, his Lordship gave the defendant leave to move the Court to set aside the verdict for the plaintiff and enter a nonsuit. A rule *nisi* was accordingly obtained for that purpose early in the term; against which

Sir *V. Gibbs*, *Park*, *Topping*, *Marshall*, Serjt. and *Scarlett*, shewed cause, and contended that the act of the captain, in going to trade at an enemy's settlement, unauthorized as it was by his owners, and illegal in itself, thereby subjecting their property to seizure and confiscation, though intended for their benefit as well as his own, was barratrous. That the act of trading with an enemy, and going into his port for that purpose, is illegal, and subjects the ship and cargo to confiscation, cannot be disputed; and the sale of arms and ammunition to them does not lessen the illegality. And no continuation or repetition of such illegal practices can render them less unlawful. This the captain was bound to know. Besides which, there is evidence in the case to shew that he was conscious at the time of the risk his owners were incurring by his misconduct. Next, the act was unauthorized by the owners. Nothing short of their positive directions to go to *D'Elmina* could excuse him as to them. It was not enough that he had a discretion given to him to trade where he thought best on the coast, and instruction "to make the best purchases with dispatch;" for that must mean *legal* purchases and *legal* dispatch. [Lord *Ellenborough*, C. J. Certainly it must be so considered.] Then an illegal act by a captain of a ship, unauthorized by his owners, and contrary to his duty to them, by which he exposes their property to confiscation, is criminal and barratrous as against them; although, if successful, it might have been advantageous to them, as well as to himself. For it is not necessary to constitute barratry, that the immediate object of the captain should be to benefit himself at the expense of his owners. This appears from all the text writers,^(a) and cases upon the subject. In *Knight v. Cambridge*,^(b) it was decided (as appears from later cases,^(c) (for that point is not stated in the printed reports of the case,) that the sailing out of port, without paying duties, whereby the ship was subjected to forfeiture, was barratry: and yet that could only have enured, if successful, to the benefit of the owners, and not of the master. But in *Stamma v. Brown*, 2 Stra. 1173, from whence a contrary doctrine may at first sight appear to be deducible, the act complained of, namely, *deviation*, was ambiguous in its nature, and might have been done innocently or ignorantly, and not with a fraudulent intent. And therefore in ascertaining such intent it might be proper to inquire whether or not the deviation were intended for the masters' or owners' benefit. And the same explanation is given by Lord *Mansfield* of the case of *Elton v. Brogden*, 2 Stra. 1264, in *Vallejo v. Wheeler*, Cowp. 154: the act of deviation (namely, the returning into port a second time upon the capture of a second prize) was shewn not to be barratrous, being done for the benefit of the owners. In this case, however, there is no necessity for adverting to the criterion of intent; because the act, which was wilful, is in itself illegal, and necessarily injurious to the owners. Mr.

(a) Vide *Park* on Insur. ch. 5. and *Marshall*, b. 1. ch. 13. s. 6, and the authorities cited.

(b) 1 Stra. 581. 2 Lord Ray. 1349. 8 Mod. 230.

(c) Vide *Stamma v. Brown*, 2 Stra. 1174, and the MS. note of that case afterwards referred to; and *Vallejo v. Wheeler*, Cowp. 153.

Justice *Buller*, in *Salucci v. Johnson*, (a) had no doubt that if the resistance of a neutral ship to be searched by a belligerent were a breach of neutrality, (which has since been so determined in *Garrels v. Kensington*, 8 Term Rep. 230,) it would be an act of barratry; being contrary to the master's duty: and yet it is plain that the master's motive could only be to serve his owners. And no doubt that the breach of an embargo would be barratry; though it was unnecessary to decide that point in *Robertson v. Ewer*, 1 Term Rep. 129; as smuggling has since been holden to be in *Havelock v. Hancill*, 3 Term Rep. 277. Next, however, to the case of evading the port duties, they relied principally upon *Moss v. Byrom*, 6 Term Rep. 379, as governing the present case. There a ship, having taken out a letter of marque (but without a certificate, which is necessary to its validity) merely to encourage seamen to enter, and without any intention of using it to cruise; the captain, contrary to his instructions, cruized for and took a prize; and his ship was afterwards lost, in consequence of his following the prize into *Bermuda*. This was contended not to be barratry, because the capture was made for the benefit of the owners, which was evidenced by the prize being libelled in their, as well as the captain's name: but the Court thought that made no difference; and that the act, being contrary to the captain's duty to his owner, was barratry. The principle and judgment of that case are not at all impeached by that of *Phyn v. The R. Ex. Ass. Comp.* 7 Term Rep. 508, or by what was there said in explanation of the former case: for the circumstances of the former, as well as of the present case, fall in with the definition of barratry relied on in *Phyn v. The R. Ex. Ass. Comp.* given from the MS. note of *Stamma v. Brown*, namely, that it is "a breach of trust in the master *ex maleficio*:" and therefore it was holden, that a deviation through mere ignorance would not be barratry. And this falls in with the distinction before taken between acts of the captain in themselves illegal, and necessarily subjecting the property of his owner to hazard; such as the making prize in the former case, without lawful authority, and the trading with an enemy in the present case; and acts which are in themselves ambiguous, such as deviation, where evidence of intent may be let in to explain them. In *Moss v. Byrom*, as in this case, the captain sought a benefit to himself through the medium of an act, which, if it succeeded, necessarily benefited his owners also; but in both cases, he risked the whole of his owners' property, while his own risk was comparatively small: and whatever his motive might be, which it would be difficult to prove, the act itself was a public offence, and necessarily injurious to his owners, and therefore comes within every definition of barratry.

Garrow and *Marryat*, contra. All the books agree that barratry imports fraud and crime in the master or mariners against their owners. The act must be a breach of trust, and done *ex maleficio*, or *malo animo*. There is no case as was said in *Phyn v. The R. Ex. Ass. Company*, 7 Term Rep. 508, which says that an act is barratrous, merely because it is against the interest of the owners, *unless it be done with a criminal intent*; and such an intent is necessarily implied in the very definition of barratry. How then can it be applied to this case, where the obvious motive of the act was to make the cheapest and speediest purchases for his employers? for the benefit to himself from expediting the voyage bore no comparison to theirs: what he gained in receiving his commissions sooner would in part be balanced by receiving so much less wages reckoned by time. Besides, the going into *D'Elmina* was not done by him, as master, for any purpose of navigation, but as supercargo, for commercial purposes. Admitting that the going into an enemy's port for this purpose might not be warranted by the legal import of the captain's instructions; yet if he erred through mistake, and intended to promote his owner's interest, it will not be a crime as against those owners. And though the

(a) *B. R. Tr.* 25 G. 3. *Park on Insur.* ch. 18, near the conclusion.

usage of the trade will not legalize the act, it serves to shew *quo animo* it was done. The arms and ammunition were not sold to the *Dutch* for the purpose of hostility, but as the common articles of barter with the natives of the country for slaves. All the cases, which shew that deviation, unless made with intent to prejudice the owner, is not barratry, apply to this case: For some benefit is derived to the captain even from the protraction of the voyage. It is not enough that the act is illegal, unless the *malus animus* be specially directed against the owner. If the captain were guilty of murder, &c. upon a collateral occasion, whereby a prejudice ensued to his owner, that would not be barratry. In *Moss v. Byrom* the captain's act was that of a pirate and robber, done in direct contravention of the order of his owner, and of the charter-party under which he was sailing. But this was, at most, a mere error in judgment. And the supposed generality of the doctrine laid down in the former case was corrected and explained in *Phyn v. The R. Ex. Ass. Company*. The only case, which bears at all the other way, is that of the evasion of the port duties; of which there is a very imperfect account: and *non constat* with what intent the attempt was made.

Lord ELLENBOROUGH, C. J. As the question raised involves in it the nature and definition of barratry in general, the Court will look into the cases, and particularly that of the port duties, if any further information can be obtained of it, before they deliver their opinion. But I cannot refrain from making a few observations at present upon the argument which has been urged. It has been asked, how is this act of the captain in going to *D'Elmina*, in order to purchase the cargo for his owners cheaper and more expeditiously, a breach of trust, as between him and them? Now, I conceive that the trust reposed in the captain of a vessel obliges him to obey the written instructions of his owners where they give any: and where his instructions are silent, he is at all events to do nothing but what is consonant to the laws of the land, whether with or without a view to their advantage: because in the absence of express orders to the contrary, obedience to the law is implied in their instructions. Therefore the master of a vessel, who does an act in contravention of the laws of his country, is guilty of a breach of the implied orders of his owners. I cannot, therefore, for a moment suffer it to be supposed that a captain is not guilty of a breach of trust to his owners, who, in contravention of the law, the observance of which, nothing being expressed to the contrary, is implied in their orders, does an act which is injurious to them.

His Lordship, a few days afterwards, delivered the judgment of the Court.

The question in this case is, whether a loss of a ship incurred by an illegal act of the master, not authorized by his owners, in going into *D'Elmina*, a *Dutch* and enemy's port on the coast of *Africa*, and trading there for slaves by a barter of arms and warlike stores, on account of which illegal traffic the vessel insured was seized by a king's ship, and afterwards condemned in the *West Indies*, be barratry; or whether, as contended on the part of the defendant, in order to constitute barratry, the act should not appear to have been done with a view of promoting the master's benefit to the prejudice of his owners. It is extraordinary that this species of loss, occasioned by the misconduct of the master, selected and appointed as he is by the owners themselves, and liable to be dismissed by them only, should ever have been made the subject of insurance; and it is the more so, as it has an impolitic tendency to enable the master and owners, by a fraudulent and secret contrivance and understanding between themselves, to throw the ill success of an illegal adventure, of which the benefit, if successful, would have belonged solely to themselves, upon the under-writers. So, however, it is, that this description of loss has, from the earliest times, held its place, as a subject of indemnity, in *British* policies of insurance. The original meaning of this term is to be collected from the *Italian* language, and is, according to *Dufresne's Glossary*, verbum Barratria, "*fraus, dolus, qui fit in Contractibus et Venditionibus.*"

He does not apply it in any marine sense, or with reference to the particular relation of master and owners. In that sense, however, in which it is peculiarly used, as applied to subjects of *British* marine insurance, in the earliest reported case which we find on the subject, it is considered as being precisely tantamount to *fraud*, in the particular relation which subsists between master, mariners, and owners; being such by which a loss may happen to the subject matter insured. In *Knight v. Cambridge*, 1 Strange 581, where the breach was assigned in a loss "*per fraudum et negligentiam*" of the master; and where it was objected, in arrest of judgment, that the fraud and negligence of the master were not within the policy, being more general than the word *Barratry*; *Raymond, J.* in the report of the same case in 8 Mod. 231, held, that "*per fraudem aut negligentiam* would not have been good." (a) So that the *negligence* was considered as immaterial, and the *fraud* as being the substantial matter constituting the barratry. And the Court (in the report in Strange) held that negligence was not within the policy, but that fraud was. Now, as no limitation is put upon that term in the record in *Knight v. Cambridge*, we must understand the court as holding that fraud and barratry were in effect words of co-extensive import; that is, that barratry included *every species of fraud* in the relation of the master to his owners, by which the subject matter insured might be endangered. The particular manner in which the loss was in that case occasioned does not appear in any of the reports of it, either in Strange, Lord *Raymond*, or 8 Modern. But a MS. note of Mr. *Ford* of the argument in *Stamma v. Brown*, in referring to the case of *Knight v. Cambridge*, and describing the question in that case upon the record, and stating that "fraud was barratry," adds, "*if the master sail out of the port, without paying port duties, whereby the goods are forfeited, lost, or spoiled, that is barratry.*" (b) (and which probably was the question of fact decided at the trial, or upon a case in the Common Pleas.) And from what is said of the facts of *Knight v. Cambridge*, in *Vallejo v. Wheeler*, Cowp. 153, both by counsel and by Lord *Mansfield*, it was a case in which the captain, whose duty it was to have paid the port duties before the ship went out of port, had not done so; and is therefore most probably the same case as is alluded to by Lord C. J. *Lee*, in *Stamma v. Brown*, 2 Stra. 1174, where he compared the case then in question "to the case of a *sailing out of port, without paying duties, whereby the ship was subjected to forfeiture*; and which had been, he says, holden to be barratry." In a MS. note of the case of *Stamma v. Brown*, which was read to us by my Brother *Lawrence*, Lord C. J. *Lee* defines barratry as being "some breach of trust in the captain *ex maleficio*." And in the note of the same case with which I have been furnished from Mr. *Ford's* MS. Lord C. J. *Lee* says, "barratry must be *ex maleficio* with intent to destroy, waste, or embezzle the goods; (that it must be remembered, was a policy on goods,) and therefore although this might be a deviation, yet I do not see how it can be considered as barratry. I make no question that there may be such a deviation as will amount to barratry; as where the master deviates to burn, sink, destroy, or throw the ship into the enemy's hands; or where he has benefit by the deviation; as if he himself had insured the goods: and therefore it was a material part of the case, whether the master had any benefit by this alteration of the voyage: for that might have been evidence of fraud in him, &c." Of course, he did not consider the benefit of the master as a necessary ingredient in the constitution of barratry in all cases, but only as a pregnant circumstance

(a) This is stated in the margin of the 2d edition of the 8th vol. of Mod. Rep. in 1769. Vide the preface to that edition; but it is not in the 1st edition of 1730, nor in the last, the 5th edition of 1795. The concluding sentence of the case, as it stands in the edition of 1730, (which is not to be found in the two other editions I have referred to) is as follows, "And they, (the whole Court) all agreed that fraud is barratry, though negligence might not; So the judgment was affirmed."

(b) The same account of the case of *Knight v. Cambridge* is given by the counsel on both sides in the MS. argument of *Stamma v. Brown*.

to prove the existence of such a fraud in point of fact, in a particular case. In *Nutt v. Bourdieu*, 1 Term Rep. 323, Lord *Mansfield* defines barratry nearly in the same terms, viz. as partaking of something criminal, and as committed against the owner by the master or mariners. And Lord *Hardwicke*, in *Lewen v. Suasso*, Posteth. 147, tit. Assurance, had before defined it to be "an act of wrong done by the master against the ship and goods." Willes, J. in giving the judgment of the Court in *Lockyer v. Offley*, 1 Term Rep. 252, a case decided just before that of *Nutt v. Bourdieu*; and upon which occasion he must be understood as speaking in conformity with the opinion upon this point of Mr. Justice *Buller*, who was then present: and probably after some communication on the subject with Lord *Mansfield* also, who happened then to be absent; defines barratry as including "every species of fraud or knavery of the master of the ship, by which the freighters or owners (the freighters in that case were owners *pro tempore*) are injured." And in *Vallejo v. Wheeler*, Cowp. 155, *Aston, J.* after stating that the conduct of the master was clearly barratry, adds, as the reason which induced him to form that conclusion, "for he was acting for his own benefit, without intending any good to his owner, and without his consent and privity." Here considering, as Lord C. J. *Lee* had done before in *Stamma v. Brown*, the circumstance of private benefit accruing to the master as evidence of fraud in him in the particular case, and not essential to its constitution in all cases whatever. And he adds afterwards, "I am clearly of opinion that this change of the voyage for an iniquitous purpose was barratry; which is not confined to the running away with the ship, "but comprehends every species of fraud, knavery, or criminal conduct in the master, by which the owners or freighters are injured. He does not add, "and by which the master is benefitted;" which he must have done, if he had considered the actual or intended benefit of the master as essential to the definition of barratry. In *Robertson v. Ewer*, 1 Term Rep. 127, *Buller, J.* upon the trial, was of opinion, and it does not appear upon the argument to have been denied by the Court, that sailing out of port without leave, in breach of an embargo, in consequence of which the owners afterwards sustained a loss, in respect of seamen's wages and provisions, by the detention of the ship, was barratry. The only question made by the Court was, whether a loss of this kind were recoverable on a policy upon the body of the ship. And although it was urged in argument for the defendant, that what was done by the master had been intended for the benefit of the owners, the Court did not advert to it as a point at all material to the decision of the question. In *Moss v. Byrom*, 6 Term Rep. 379, where a master, under letters of marque defective in point of validity for want of a certificate, and which had been put on board by the owners with a view to encourage seamen to enter, and without any intention of their being used for the purpose of cruising, had cruized for and taken a prize, and had afterwards libelled such prize for condemnation in the name of himself and his owners, in a port in the *West Indies*, and during his stay there on that occasion was lost; this was holden by Lord *Kenyon* and the rest of the Court to be barratry. After these various decisions of courts of law, we are certainly warranted in pronouncing that a fraudulent breach of duty by the master, in respect to his owners; or, in other words, a breach of duty in respect to his owners, with a criminal intent, or *ex maleficio*, is barratry. And with respect to the owner of the ship or goods, whose interest is to be protected by the policy, it can make no difference in the reason of the thing, whether the prejudice he suffers be owing to an act of the master, induced by motives of advantage to himself, malice to the owner, or a disregard to those laws which it was the master's duty to obey, and which (or it would not be barratry) his owners relied upon his observing. It has been strongly contended on the part of the defendant, that if the conduct of the master, although criminal in respect of the state, were in his opinion likely to advance his owner's interest, and intended by him to do so, it will not be barratry. But

to this we cannot assent. For it is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed in him, but acting meritoriously, when he endeavours to advance the interest of his owners by means which the law forbids, and which his owners also must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. In laying down this doctrine we feel ourselves supported by the several eminent authorities already referred to. And in giving this opinion we do not feel any apprehension that simple deviations will be turned into barratry, to the prejudice of the under-writers; for unless they be accompanied with fraud, or crime, no case of deviation will fall within the true definition of barratry, as above laid down.

Another argument was used, which hardly appears to have been used seriously; namely, that the captain in this case united in himself the two characters of supercargo and captain: and that as captain he must be considered as obeying the directions of his owners, given to himself, the captain, by himself in his character of supercargo. It is sufficient to state such an argument, to shew that it can have no weight. The directions of the owners as to the conduct of the voyage, and as to places where the trade was to be carried on, are to be looked for in their instructions: which coupled with their duty to their country, must, during every moment of the voyage, be considered as either expressly or impliedly directing the captain to conduct the ship to those places only where trade might be carried on without violating the laws of their country. For these reasons we are of opinion, that the rule nisi which has been obtained in this case, must be discharged.(1)

Doe, on the several Demises of Nathaniel Bates, and Ann his Wife, v. Clayton and Another.

8 East, 141. Nov. 28, 1806.

One seized in fee, having only one daughter *A.* married to *N. B.* and two grandsons *W. T. B.* and *M. B.* devised, "as for my worldly and temporal estates, &c. I give to *N. B.* 1s.; and devised that he shall not come upon my premises or hereditaments on any account whatsoever. Then after giving a legacy to his grandson, *M. B.* he devised to his daughter 20l. a year out of the profits of his estate or lands at Eaton:" and then devised to his grandson, *W. T. B.* "all his messuage and dwelling-house situate at Eaton aforesaid, with all hereditaments, &c. thereunto belonging, &c. and that *W. T. B.* when 21, shall enter upon and enjoy the above-mentioned ESTATES, situate at Eaton aforesaid: but that if he should leave his profession, all his right and title to the estate devised shall devolve and descend to his brother *M. B.* Held that in order to effectuate the intention of the deviser to exclude, at all events, his son-in-law *N. B.* from coming upon his premises, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son *W. T. B.* died before his mother); *W. T. B.* took a fee. Aided too, as that construction was, by the introductory words as to his worldly estate; by giving *N. B.* 1s.; by the annuity for life to his daughter, payable out of the same estate; and from the direction for the estate to descend and devolve to *M. B.* if his elder brother *W. T. B.* should leave his profession: (in which event *M. B.* would only have taken *pur autre vie*.) But held that the annuity devised to his daughter *A.* out of the profits of the estate, being no charge upon the devisee, or upon the estate given to him, would not have passed the fee to *W. T. B.*: nor would the word estate, as here used in the devise to him; being by reference restricted to the antecedent words.

IN ejectment for lands in *Little Eaton*, in the county of *Leicester*, tried at

(1) The principle of this decision was recognized by the Supreme Court of Connecticut, June Term, 1811, in the case of *Brown & al. v. The Union Insurance Company at New London*. See also *Heyman & al. v. Parish*, 2 Campb. 150. *Calhoun v. The Insurance Company of Pennsylvania*, 1 Binn. 293. *Wilcocks & al. v. The Union Insurance Company*, 2 Binn. 574. *Doederer v. The Delaware Insurance Company*, decided by Judge

Leicester before *Chambre*, J. a verdict was taken for the plaintiff, subject to the opinion of the Court upon the following case.

Thomas Wright, being seised in fee simple of the premises in question, by will duly executed, dated the 25th July 1795, devised as follows: "And as for my worldly and temporal estate which it has pleased God to endow me with, I dispose thereof in the following manner. First, I give and bequeath unto *Nath. Bates*, 1s. at the time of my decease, or when called for: and I further devise, that the aforesaid *N. Bates* shall not come upon my premises or hereditaments on any account whatsoever. I also give, devise and bequeath unto my grandson *Matthew Bates* 400*l.* to be paid at the age of 21 years: 100*l.* of it is now in security by bond from my wife's nephew *J. Clayton*, which was part of my wife's portion: and the other 300*l.* arising from the profits of my estate and money at interest. I also give, devise and bequeath to my daughter *Ann* 20*l.* per annum, during the term of her natural life, to be paid half-yearly out of the profits of my estate or lands at *Eaton*." And then after some specific legacies of plate and furniture, and bequeathing the residue of his household goods, with his books, &c. between his two grandsons *Wright Thomas* and *Matthew Bates* equally; he says, "And I do hereby give, devise and bequeath unto my grandson *Wright Thomas Bates*, all that messuage and dwelling-house situate at *Eaton* aforesaid, with all houses and hereditaments thereunto belonging, and also all those parcels of land situate in the lordship, precincts, and territories of *Eaton* aforesaid, now in my own and *Geo. Blankley's* occupation, and to continue so until *Michaelmas* 1801, And my will further is, that my grandson *Wright Thomas Bates* when he arrives at the age of 21 years, shall enter upon and enjoy the abovementioned ESTATE, with the hereditaments thereunto belonging situate at *Eaton* aforesaid. And my will further is, that if my grandson *Wright Thomas Bates* should make an error and run away from his profession that he is now settled in, all his right and title and claim to the estate of lands and houses that I have now devised to him shall devolve and descend to his brother *Matthew Bates*. And I do hereby make and ordain my grandson *Wright Thomas Bates*, upon his good behaviour, to be my sole executor." The premises above devised are the premises in question. The testator died seised in *November* 1797, leaving only one child *Ann*, one of the lessors of the plaintiff, and who had been married many years to *Nath. Bates*, the other lessor of the plaintiff, by whom she had two children, *Wright Thomas Bates* and *Matthew Bates*. The testator died possessed of personal assets sufficient to pay his debts and the legacy of 400*l.* bequeathed to his grandson *Matthew*, and the several other legacies. *Ann Bates* had for several years previous to and at the time of the death of the testator, together with her two children, lived apart from her husband and with the testator, at whose expence they were maintained and the children educated. *Wright Thomas Bates*, at the time of his grandfather's making his will and until his decease, was an apprentice to an apothecary, and complied with the terms of the will in every respect, and continued in his profession conformably thereto. Upon his attaining the age of 21, he entered upon the estate and premises so devised to him, and enjoyed the rents and profits thereof till the time of his death, without issue, in *June* 1802. And by his will duly executed, dated 25th of *March* 1802, *W. T. Bates* devised the estate in question, together with his personal estate, to the defendants, in trust to convert the same into money, and after payment of his debts and funeral expences to place the money out at interest, and pay such interest to the sole use of his mother for the maintenance of herself and her son *Matthew*

Washington in the Circuit Court of the United States, cited 2 Binn. 581. *M Intyre v. Browne*, 1 Johns. 229. 6 Mass. Rep. 117. *Abbott on Shipping* 194, 5, 6. (Story's edit.) particularly, the learned editor's note. [See also, *Grim v. Phanix Ins. Co.*, 13 Johns. 451. *Vos v. Un. Ins. Co.*, 2 Johns. Cas. 187. *Suckley v. Delafield*, 2 Caines, 222. *Patapsco Ins. Co. v. Coulter*, 3 Pet. 222. *Amer. Ins. Co. v. Dunham*, 12 Wend. 463.—W.]

until the latter should attain the age of 21 years; then to pay *Matthew* 100*l.* in addition to the 400*l.* left him by his grandfather: continuing the remainder at interest for his mother during her life, and then to pay the principal to his brother *Matthew*. The question was, whether *Wright Thomas Bates* took a fee in the estate in question, under the will of his grandfather *Thomas Wright*, or only an estate for life? If the latter, the verdict to stand: if the former, the verdict to be entered for the defendants.

The case was argued on a former day, by *Reader* for the plaintiff, and *Torkington* for the defendants: but as the arguments turned wholly on the intention of the devisor, to be collected from the particular provisions of his will, and are adverted to in the judgment of the Court, they need not be repeated. After time taken for consideration,

Lord ELLENBOROUGH, C. J. delivered judgment.—The question is, whether, by the will of *Thomas Wright*, his grandson *Wright Thomas Bates* took an estate in fee, or for life only; inasmuch as in the devise to him there are no words of limitation, without which a fee will not pass, unless there be other words in the will to shew the testator's intent to pass a fee, or unless the devise be for some special purpose, which cannot be effected without a larger estate than an estate for life? The introductory clause of the will, it is admitted, is not sufficient of itself to pass a fee: nor will the annuity given to the testator's daughter, of 20*l.* a year, for her life; as it is given *out of the profits of the estate*, and is no charge on the devisee, or on the estate given to him. And though the word *estate* be used, (which in most cases will carry the whole interest which a testator has,) yet, as it is in this case by its reference restricted to the antecedent words of devise, it cannot pass a fee, as those antecedent words will not do so. It is then to be seen whether in order to *effectuate the views of the testator*, as collected from his will, it be necessary to give such estate. The objects which he had in view seem to have been, first, the exclusion of his son-in-law from any advantage from his estate, of which he would have been tenant by the curtesy, if it had been permitted to descend to his daughter; and, secondly, to prevent his grandson *Wright Thomas Bates* from deserting the business in which he was engaged, and which he might be induced to leave, if an unqualified right in the testator's estates were given him. These appear to have been the testator's objects, from the legacy of one shilling given to his daughter's husband; from the testator's desire that the husband should not come upon his premises or hereditaments on any account whatever; from his giving his daughter an annuity of 20*l.* a year during the term of her natural life, payable out of the profits of his lands or estate at *Eaton*; and from his direction, that if his grandson *Wright Thomas Bates* should make an error, and run away from his profession, his right, title, and claim to the estate of lands and houses devised to him should descend and devolve to his brother *Matthew Bates*. Let us then see if for these purposes it be necessary that the grandson *Wright Thomas Bates* should take a fee. And to induce him to continue in his profession, it does not seem necessary that he should: for the loss of the estate for his life, and the depriving him during that period of the advantages of it, (the enjoyment of which might lead him to think the pursuit of his profession to be no longer an object,) might very effectually answer that purpose of the testator, who might not mean that *Wright Thomas Bates's* children should have no advantage from his, the testator's estates, in case their grandmother, the testator's daughter, should let it descend to them; although their father might make an error, and run away from his profession. The removing of that, which in the apprehension of the testator might operate as an inducement to him to quit his profession, during the whole time it was capable of being exercised, and the leaving him under the same necessity to carry it on as was the occasion originally of his being placed in it, might very reasonably be thought by the testator a sufficiently powerful security for his grandson's continuing in it; al-

though in the event of his surviving his mother the reversion in fee might come to him. So that it does not seem necessary, for the purpose of accomplishing the latter object of the testator, to give to *Wright Thomas Bates* more than an estate for life, determinable on his running away from his profession; with a limitation to *Matthew Bates*, in that event, of an estate for the life of his brother. And this is the natural construction of the devise to *Matthew Bates*, which furnishes no inference that the estate before given was meant to be more than an estate for life: for it refers to what was before given to his brother: and the testator does not seem to have had any particular reason for limiting his, *Wright Thomas Bates's* estate to *Matthew Bates*, except for the purpose of obliging his eldest grandson to continue in his profession. But with respect to the other object of the testator, viz. that of excluding his son-in-law from any advantage from his estates, it does not appear to us that this object can be sufficiently answered, unless the grandson *Wright Thomas Bates* took an estate in fee; inasmuch as in the event which has happened, namely, of *Wright Thomas Bates's* dying in the lifetime of his mother, (and that was an event not so unlikely, as not to have been probably contemplated by the testator,) the lessor of the plaintiff, *Nathaniel Bates*, would, as he now insists, be entitled to the lands devised as tenant by the curtesy, if his son *Wright Thomas Bates* took only an estate for life. The testator appears to have considered his will as giving to his devisee a power of preventing his son-in-law from coming upon his estates; for he desires that he shall not come upon his premises and hereditaments on any account whatsoever; which request could only operate by being addressed to some person who might have the power of preventing him from coming upon those premises and hereditaments, and could only operate for so long a time as such person had that power. And therefore if the devisee, *Wright Thomas Bates*, took but an estate for life, on his death this object of the testator would be no longer attainable; and he, whom the testator desired might not come upon his premises on any account whatsoever, would by law be entitled to a freehold in them, and to enter and take possession of them. This the devisor could never mean: for there is no reason to think it was his wish to prevent his coming on the estate during the life only of the grandson; but that he should not at any time *during his own life* come upon it; and therefore, to give effect to that devise, the devisee must have been intended to take an estate commensurate with that desire; and as an estate for life would not be adequate to such purpose, it follows that the devisee must have been intended to take a fee. This construction may be considered as in a degree aided by the introductory words of the will respecting his worldly and temporal estate, &c., which are allowed to have some weight in cases where the intent of the testator is doubtful, and where there are other words in the will to carry his intent into effect: and also by the devise to his daughter, who was his heir at law, of an annuity for her life out of the profits of his estates. For it is highly improbable, when he made a partial provision for her for her life out of his estates, that he should mean that she should take the whole of them upon the death of his eldest grandson; an event which cannot well be understood to have put an end to the reasons or motives which induced such particular disposition of his property: and we have no reason to think that the devisor meant to have dealt more favourably by his son-in-law in the event of his grandson's death, than he expressly did when his grandson was living. For these reasons we are of opinion, that the grandson *Wright Thomas Bates* took an estate in fee, and that the postea must be delivered to the defendant.

Postea to the Defendant.

Sir Oswald Mosley, Bart. an Infant, v. W. Massey, Sir J. P. Mosley, Bart. and Others, Infants, &c.

8 East, 149. Nov. 28, 1806.

A. having an estate in the county of *Monmouth*, of which he was seised in fee in possession, and another estate in the county of *Radnor*, of which he was also seised in fee, subject to the uses of his marriage settlement; (by which he covenanted to convey to the use of himself and his wife for life, remainder to his first and other sons in tail;) which left him in equity a disposing power over the reversion only; both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another co-heir of his uncle; by his will, misreciting the estate of which he was seised in fee in possession to be in the county of *Radnor* instead of *Monmouth*; and misreciting his disposable reversion to be in the county of *Monmouth* instead of *Radnor*, devised his estate so misdescribed to be in *R.* which was in truth the reversionary estate, to his wife for life; remainder to his only son for life; remainder to his sons and daughters in tail, in strict settlement; remainder to his own daughter, &c.; and devised the reversion only of his estate so misdescribed to be in *M.* of which, in truth, he was seised in fee absolute, after the deaths of his wife and only son without issue, to his daughter, &c.; yet held, that enough appeared on the face of the will, which also described these estates as formerly belonging to his uncle, to shew that the devisor's intent was to pass the present interests of his estate in fee absolute, which was in the county of *M.* and the reversion of his settled estate in the county of *R.* although he had respectively misdescribed their local situations.

THE Lord Chancellor sent the following case for the opinion of this Court.

In the year 1758, *John Hope*, Esq. died seised in fee of freehold estates in the counties of *Monmouth*, *Radnor*, and *Northumberland*, which on his death descended to his three coheirs at law, who were *Mary Jones* widow, *Thomas Tonman* Esq., and *Hannah Jones*, wife of *Thomas Jones* Esq. By indentures of lease and release dated the 5th and 6th of *January* 1762, being a settlement made previously to the marriage of *T. Tonman* with *Dorothy Roberts*; after reciting that *T. Tonman*, as nephew and one of the heirs at law of *John Hope*, was seised in fee of one undivided third part of certain manors, lands, &c. late the estate of *John Hope*, in the several counties of *Northumberland*, *Monmouth*, and *Radnor*; and that it was agreed, that a division of all the real estates of *John Hope* should be made, and that after such division the third part allotted to *T. Tonman* should be conveyed to trustees for the uses after mentioned; it was covenanted and agreed, that *T. Tonman* should settle his allotment of the said manors and lands, &c. to the use of himself for life; remainder to trustees for preserving contingent remainders, &c.; remainder to the use of *Dorothy* his intended wife for life, for her jointure, and in satisfaction of dower; remainder to the use of the first and other sons of the marriage successively in tail; remainder to the use of himself *T. Tonman* in fee. By indentures of lease and release of the 20th and 21st of *April* 1762, between *T. Tonman*, *Mary Jones*, *Hannah Jones*, and *Thomas Jones*, her husband, a partition of *John Hope's* estates was made; and thereby the whole of those estates in the county of *Monmouth* was allotted and conveyed in severalty to *Hannah Jones* and her heirs, for her third: certain parts of his *Radnorshire* estates were allotted and conveyed in severalty to *Mary Jones* and her heirs, for her third; and other parts of the *Radnorshire* estates were allotted and conveyed in severalty to *T. Tonman* and his heirs, for his third; of which latter *T. Tonman* thereby became seised in fee, subject however to the trusts of the said settlement. In the year 1763, *T. Tonman*, in consideration of 2300*l.* purchased of *T. Jones* and *Hannah* his wife the *Monmouthshire* estates allotted to the latter for her third; and the same were, by indentures of lease and release of the 14th and 15th of *January* 1763, conveyed to *T. Tonman* in fee. *T. Tonman* had issue by *Dorothy* his wife a son *John*, since deceased, and a daughter *Elizabeth*. *T. Tonman* made his will, dated the

30th of January 1787, duly executed, in the following words: "*Whereas I am seised in fee of a messuage or dwelling-house, and several lands and hereditaments in the parish of Llanoian-gell-Nant Mellon, in the county of Radnor, and of a moiety of a messuage or dwelling-house, with several lands, hereditaments, and appurtenances thereunto belonging, in the parish of Old Radnor in the said county of Radnor: and I am also seised of the reversion in fee, expectant on the death of my wife Dorothy, and on the death of my son John without issue, of divers messuages, lands, and hereditaments, with their appurtenances, in the several counties of Monmouth and Northumberland, which were part of the estate of my late uncle John Hope deceased:* Now I do give and devise all my said estate in the said county of Radnor, with their and every of their appurtenances, unto my wife Dorothy for her natural life; remainder unto my son John for his natural life, without impeachment of waste; remainder to trustees and their heirs during the natural life of my son John, upon trust to preserve contingent uses, &c.; and from and immediately after the decease of my said son John," (then he limits the same to the use of the first and other sons of his son John to be begotten successively in tail; and in default of such issue, to the use of the daughters of his son John, share and share alike, as tenants in common in tail, with cross remainders.) "*And as for and concerning the reversion, remainder, and inheritance as well of my said estates in the said county of Radnor, with the appurtenances, from and immediately after the determination of the said several and respective uses and estates thereof herein-before limited, and as the same shall respectively end and determine, as also of the said messuages, lands and hereditaments in the said several counties of Monmouth and Northumberland, with their appurtenances, from and after the death of my said wife, and of my said son John without issue, I do give and devise the same unto and to the use of my daughter Elizabeth for her natural life, without impeachment of waste; remainder to the use of the said (trustees) and their heirs to preserve the contingent uses, &c."* (And then after her death he limits the same in strict settlement to the use of her first and other sons successively in tail: remainder to the use of her daughters as tenants in common in tail, with cross remainders between them;) with divers remainders over. The testator T. Tomman died without revoking or altering his will, leaving his wife Dorothy and his two children John and Elizabeth him surviving. The testator T. Tomman was in point of law seised in fee of the estates in the county of Radnor, of which his will states him to be seised in fee: but those estates were bound in equity by his marriage settlement before mentioned, under which he was at the time of making his will and at the time of his death, entitled to the equitable reversion in fee thereof, subject to the prior trusts of his marriage settlement of the 5th and 6th of January 1762: and the testator had not, at the time of making his will and at his death, any other estate in the county of Radnor. The testator in point of fact was not seised of the reversion in fee of the estates in the county of Monmouth, of which his will states him to be so seised; but he was at the time of making his will and at his death, seised in fee in possession of the estates in the county of Monmouth which had been allotted to Hannah Jones for her third upon the above-mentioned partition, and which estates were purchased by the testator and conveyed to him by the said deeds of the 14th and 15th of January 1763. And the testator had not, at the time of making his will and at his death, any other estate in the county of Monmouth. The questions for the opinion of the Court are,

First, Whether John Tomman the son, by virtue of the will of Thomas Tomman, took any and what interest in the real estate in the county of Monmouth, of which T. Tomman was so seised at the time of making his said will.

Second, Whether *Elizabeth Tonman* the daughter took any and what interest by virtue of the said will, in the *Monmouthshire* estate.

Third, Whether *John Tonman* took any and what interest in the *Radnorshire* estate.

Fourth, Whether *Elizabeth Tonman* took any and what interest in the *Radnorshire* estate.

Wetherell for the plaintiff. The devisor was seised in fee in possession of the *Monmouthshire* estate which he had purchased of *Jones*; and he had a disposing power over the reversion only of the *Radnorshire* estate; that estate being bound in equity by the uses of his marriage settlement. But in the recital of his will he has reversed the local description of the two estates; misdescribing the estate of which he was seised in fee in possession, as being in the county of *Radnor* instead of *Monmouth*; and *vice versa* misdescribing the reversionary estate which he had to dispose of, as lying in the county of *Monmouth* instead of *Radnor*; (for in fact he had no estate in *Northumberland*.) If this mistake can be corrected, all the devises severally made of each estate will take place of course; which otherwise are for the most part incongruous and inapplicable. First, the mistake is judicially apparent upon the face of the will; and by comparing the recital with the disposing clauses, and then with the several estates which he had to dispose of, it is plain that when the devisor recites that he was seised in fee (by which must be understood in possession) of one estate, he meant his estate in *Monmouthshire*, in which he was seised of the absolute fee; and not that in *Radnorshire*, in which he had only a reversion disposable: and that when he recites himself to be seised of the reversion in fee, expectant, &c. (which was the exact description of his settled estate) of another estate, he must have intended that in the county of *Radnor*, and not of *Monmouth*, where he had no such reversion. Unless therefore this verbal mistake can be rectified by the apparent intent of the devisor, the will must fall to the ground: for being seised only of the reversion of the *Radnorshire* estate in equity, he could not devise it to present uses. Nor on the other hand, is it reasonable to suppose that he should only dispose of the reversion of the *Monmouthshire* estate, (of which he was seised in fee in possession,) after the deaths of his wife and son without issue, to whom he had not before given any interest in that estate. The mistake is further shewn by the description which he adds to the reversionary interest in the lands which he meant to devise, namely, "*which were part of the estate of my late uncle John Hope deceased*;" which description immediately applied to the estate in *Radnorshire*, which he had by descent from his uncle; the other estate, though once part of his uncle's property, coming immediately to him by purchase; though he has reversed the local description of the two estates. Secondly, assuming that it appears judicially to the Court, that the local description of the two estates is a mere mistake, the Court may correct it by construing the will according to the real intention apparent of the devisor. As where one having only a reversionary estate in the city of *Worcester* devised all his estate in possession in that city; yet the reversion was holden to pass. *Heuster v. Corbett*, 34 H. 6. p. 16, recognized in *Howe v. Connye*, 1 Leon. 180. So a devise of a *manor* has passed a *fee-farm rent*; (a) because the devisor, having nothing else in the manor, could mean nothing else, and the will would otherwise be void. So Plowd. 524, and Bro. Devise, pl. 48, where one, after the stat. 27 H. 8, devised that his executors should be seised to the use of A. and his assigns in fee, whereas there were then no feoffees to uses; yet the estate passed *ratione intentionis*. And in Plowd. 522, it is said, that where the intent of the testator is evident by the words, it is the office of the court so to marshal and construe the words that the intent may take place, and the thing be effected and not destroyed, if any sense at all can be made of them by law.

(a) *Incheley v. Robinson*, 3 Leon. 165, refers to Fitz. tit. Feoffments and Fails, pl. 12.

Again, a devise of all the devisor's *free land* in *H.* was adjudged(a) to pass *tithe*; he having nothing else there. *Rolle* said, that the intent should prevail, if it could be found out; though it could not be collected *ex vi termini*; for that otherwise the will would be void. And for the same reason a devise(b) of *freehold* passed *leasehold* lands, where there were none other. In *Mirrell v. Nichols*, 2 Bulstr. 176, one having a moiety in *Essex*, and the other moiety in *Kent* by several purchases from the same person, devised as "to my moieties, I devise *all* my moieties in *Kent* to *A. B.*;" saying nothing of his moiety in *Essex*; yet this was holden to pass both. And in *Owens v. Bean*, Finch's R. 395, a devise of a charity to the poor of the parish of *Langenew* in the county of *Montgomery* was sustained; though the parish of that name (in which the testator and his parents had lived and died) was in the county of *Denbigh*. There is another class of cases(c) where devises have been holden good, though the christian names of the devisees were mistaken, if the persons were ascertainable by other circumstances. And he also referred to *Vinnius' Commentary* on *Justinian*, 459.(d) Now here the correction to be made is merely by transposing the words of local description, *Monmouth* and *Radnor*, or by rejecting them altogether, and not by substituting new words of description; the estates intended to be passed being sufficiently identified by the mention of them as formerly part of his uncle *Hope's* estate.

Nolan contra. The devisor was tenant in fee of the *Radnorshire* estate, which he had by descent from his uncle *Hope*; though bound in equity by the uses of his marriage settlement; and he was also seised in fee of his estate in *Monmouthshire* unfettered, which he had obtained by purchase from another co-heir of his uncle; and as both the estates had belonged to his uncle, there is nothing in this description to distinguish them. However probable therefore it may be, that a mistake has happened in describing the different estates, the Court can have no legal certainty of it, and therefore cannot correct it, either by transposing, or rejecting words which have a sensible meaning on the face of the will in the place where they are used. First, then, supposing no transposition of the words of description can be made, *John Tonman* the son would take an estate tail by implication in the *Monmouthshire* estate; the same being limited to the devisor's daughter *Elizabeth*, after the death of his son *John* without issue; and he being the heir at law of the testator, and his common law estate abridged by the will. On this point, he referred to *Walter v. Drew*, Com. Rep. 372; *Moore v. Parker*, 1 Lord Raym. 37. 4 Mod. 316, and *Skin. 558*; *Lady Lanesborough, v. Fox*, Cas. Temp. Tolb. 262, and *Jones v. Morgan*.(e) In that view the devise to *Elizabeth*, and all the other devises of that estate, will follow. But though the son *John* took no estate in the *Monmouthshire* property by the will; yet this cannot be considered as an executory devise to *Elizabeth* after an indefinite failure of issue of *John*, and therefore too remote; because *Elizabeth* herself having only a life estate, the devise to her on failure of *John's* issue must necessarily be confined to such failure in her life-time; according to *Oakes v. Chalfont*, Pollex. 38, and *Doe v. Lyde*, 1 Term Rep. 593. Then, with respect to the *Radnorshire* property, *John Tonman* took an estate tail under the settlement; but, under the will, only an estate for life, with remainder to his sons in tail, &c.; remainder to *Elizabeth* for life, &c.: and all the intermediate estates having failed, *Elizabeth's* estate would now vest in possession. In point of law, the testator was

(a) *Saunders v. Rich*, Sty. 261. 279. 1 Rol. Abr. 614. pl. 4.

(b) *Day v. Trig*, by *Tracy, J.* 1 Pr. Wms. 287.

(c) *Picairn v. Brase*, Finch's Rep. 403. 2 Eq. Cas. Abr. 415. pl. 6, and *River's* case, 1 Atk. 410.

(d) Vi. Just. Inst. lib. 2. tit. 20. s. 29, 30, 31.

(e) 1 Bro. Ch. Cas. 206, and *Fearne's Ex. Dev.* 4th edit. 126; and all the other cases are collected in the latter book, 116 to 126, and 197, and vide *Roe d. Conolly v. Vernon*, 5 East, 51.

seised in fee of the *Radnorshire* estate, though bound in equity by the uses of his marriage-settlement; and the legal estate will therefore pass. And whether he were mistaken, in fact, in substituting *Monmouth* for *Radnor*, and *vice versa*; or whether he were mistaken in law in supposing he could deal with that estate, as if not fettered by the settlement in equity; the Court have no means of discovering. But though the will should be wholly void in consequence of the mistake, they cannot amend it by substituting the one word for the other throughout the will. As it stands, one part of the description, the county, applies properly to neither of the estates; the other, that of having belonged to his uncle *Hope*, applies equally to both: and therefore affords no criterion for distinguishing between them. The whole argument turns on two of Lord *Bacon's* maxims, P. 99 & 102, *Ambiguitas verborum latens verificatione facti suppletur, nam quod ex facto oritur ambiguum verificatione facti tollitur*. And *Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis*; the doctrine of which is illustrated by Lord *Kenyon* in *Thomas v. Thomas*, 6 Term Rep. 673. All the older cases cited for the plaintiff go on this, that inapt words of description may be rejected, if the remaining words be sufficient to describe the estate meant to be devised. But the words now desired to be expunged are sensible and material as they stand on the face of the will, and there is property on which they can attach: the only doubt is raised by evidence dehors the will: but the rule now established is, that *ambiguitas latens* may be explained by extrinsic evidence; but not *ambiguitas patens*. As where there are two persons of the same name as that mentioned in the will, evidence may be given to shew which the testator meant: or where the devise is to one by a wrong name, it may be shewn that the testator was in the habit of calling the devisee by such a wrong name. *Beaumont v. Fell*, 2 Pr. Wms. 140. So a false description may be rejected, where there is a further true description by which the identity of the person, *Pitcairn v. Brase*, Finch, Rep. 403, and *Dowset v. Sweet*, Amb. 175, or property, *Owens v. Bean*, Finch, R. 395, meant is proved. But here if the county be rejected, there is no other description left than what is common to both estates. In other cases, such as that cited from the year-book, the question was, whether the description used, though not strictly proper, were not large enough to carry the thing devised. And though it may be doubted whether some of these decisions would have been made in later times; yet they professed at least to be a construction of the words used; and not to proceed upon an undefined power of transposing and rejecting sensible words. Distinct sentences indeed have sometimes been transposed, in order to shew the testator's meaning more clearly; but there is no instance of words being taken from one sentence and put in another.

Wetherell in reply. As to the *Radnorshire* estate, it is not a sufficient answer to say, that the will, as it now stands, will be effectual to pass the legal estate, it being apparent that the deviser meant to pass the *beneficial* interest: and the devises for life to the wife and son could not operate; because they would take under the settlement, and not under the will; the one a life estate, the other in tail. Neither could the devises to trustees and the sons of *John* take effect. And as there would be no such precedent estates as those devised by the will, there would be nothing to support the devise of the reversion to *Elizabeth*. As to the *Monmouthshire* property, he contended that the son could not take an estate tail by implication, under the words giving over the estate on failure of his issue; and that the cases cited did not support that position. *Oakes v. Chalfont*, and *Doe v. Lyde*, turned upon immediate gifts for life of chattels, upon failure of issue of others, and not upon the implication of estates tail in those persons. *Moor v. Parker* makes rather against the defendant's argument. And in *Jones v. Morgan*, Lord Chancellor thought that an estate tail could not be raised by such an implication. And though such an estate was raised in *Walter v. Drew* to support the remainder; yet

that was on the ground of the apparent intention of the testator to give such an estate. But here no such intent appears; for *John*, the son, had a preceding estate tail under the settlement, which accounts for the omission of him altogether: and it would be absurd to presume an intent in the deviser to give him an estate tail in the *Monmouthshire* estate, in which nothing is directly given to him, when by the devise of the *Radnorshire* estate as it stands, he would only take for life.

The Court said they would certify their opinion; which was afterwards done as follows.

This case has been argued before us by counsel: We have considered it; and it appears to us to have been the plain intent of the testator to limit the estate, formerly of his uncle *Hope*, of which he was seised in fee in possession, to his wife for life; remainder to his son *John Tonman* for life; remainder to his first and other sons in tail general; with remainder to the daughters of his said son in tail general, as tenants in common, with cross remainders; remainder to the testator's daughter *Elizabeth* for life; with the like limitations to her children: and to limit the estate, formerly of his uncle *Hope*, of which he was seised in fee, subject to the uses of his marriage settlement, (the reversion only of which he considered himself seised of after the deaths of his wife and his son *John Tonman*, without issue) to his, the testator's, daughter *Elizabeth* for life: with remainder to her first and other sons in tail general; remainder to her daughters: But, that in describing the two several estates, the testator, or the person transcribing the will, has made a mistake in the description of them, with respect to the counties in which they are respectively situated. Comparing, however, the devising clause with the recital, and the facts stated in the case, we think that sufficient appears to ascertain beyond a possibility of doubt what estates the testator intended to limit as above, independant of their local description. We are therefore of opinion, in order to effectuate the plain intent of the testator, First, that *John Tonman* the son, by virtue of the will of his said father *Thomas Tonman*, took an estate for life, in remainder after the death of the testator's wife, in the real estate situate in the county of *Monmouth*, of and in which the said *Thomas Tonman* was so seised, as stated in the case, at the time of making his said will. Secondly, That the said *Elizabeth Tonman* took an estate for life, in remainder, in the said real estate situate in the said county of *Monmouth*, from and after the determination of estates for life in the testator's wife and his said son *John Tonman*, and of estates tail in his first and other sons, and in his daughters as tenants in common respectively. Thirdly, that the said *John Tonman*, the son, by virtue of the will of his said father, did not take any interest in the said real estate situate in the county of *Radnor*. And fourthly, that the said *Elizabeth Tonman*, under and by virtue of the will of her said father, took an estate for life, with remainder to her first and other sons in tail, with remainder to her daughters in tail, as tenants in common, in the premises situate in the county of *Radnor*, subject to and after the determination of the estates and interest to which the testator's wife and son *John Tonman* were entitled under the settlement made on the marriage of the testator, *Thomas Tonman*.

28th November 1806.

ELLENBOROUGH,
N. GROSE,
S. LAWRENCE,
S. LE BLANC.

CASES

IN

HILARY TERM,

IN THE FORTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

Doe on the Demise of Warner v. Browne.

8 East, 165. Jan. 24, 1807.

An agreement to lease at a certain rent, and that the lessor should not turn out the tenant *so long* as he paid the rent, and did not sell, &c. any article injurious to the lessor's business, either purports to be a lease *for life*, and would then be void, as not being creatable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit.

IN ejectment for a certain messuage in the Parish of *St. Sepulchre*, in the city of *London*, it appeared that the defendant held under the following agreement, "Memorandum of an agreement made the 6th of *March* 1801, between *W. Warner* and *J. Browne*. *W. Warner*, in consideration of 40*l.* doth agree to let, and *J. Browne* doth agree to take, a messuage, &c. at 40*l.* per annum clear rent, to be paid quarterly, &c. And it is further agreed, that *W. Warner* shall not raise the rent, *nor turn out J. Browne, so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to W. Warner in his business.* And it is further agreed, that in case of removal, *J. Browne* shall be at liberty to receive the aforesaid sum of 40*l.* of the next tenant *W. Warner* shall accept." Signed by both parties. It did not appear that the defendant had broken either of the stipulated conditions: but the lessor of the plaintiff rested his case on proving half a year's previous notice to the defendant to quit on the 25th of *March* 1806, after which the demise was laid. And the question was, whether the lessor had a right to determine the tenancy on such notice, considering the defendant as tenant only from year to year. Lord *Ellenborough*, C. J., at the trial, held the notice to be good: and a verdict was accordingly taken for the plaintiff, with leave to the defendant to move to enter a nonsuit. And a rule *nisi* having been obtained for that purpose in the last term, upon the ground that the agreement operated as a lease for so long time as the tenant pleased, and he complied with the conditions:

Lord *ELLENBOROUGH*, C. J., after reading his report of the evidence, asked what estate the defendant was contented to have? and whether he were not in this dilemma; that either his estate might enure for life, at his option; and then according to Lord *Coke*, Co. Lit. 42, such an estate, would, in legal contemplation, be an estate for life; which could not be created by parol: or if not for life, being for no assignable period, it must operate as a tenancy from year to year; in which case it would be inconsistent with, and repugnant to

the nature of such an estate, that it should not be determinable at the pleasure of either party giving the regular notice.

Lawes, in support of the rule, contended that the agreement might operate as a lease from year to year determinable only at the will of the tenant, so long as he complied with the terms of it; the lessor binding himself while the conditions were observed not to give notice to quit. And he cited *Right v. Proctor*, 4 Burr. 2208, that a lessor shall not recover in ejectment against his covenant: and *Doe d. Rigge v. Bell*, 5 Term Rep. 471, where though the lease by parol for 7 years was avoided by the statute of frauds, yet the lessor was holden to be bound by his agreement, as to the time of giving notice to quit.

LORD ELLENBOROUGH, C. J. It was not repugnant to the nature of the estate there, that the agreement, though void as to the duration of the lease, should regulate the time of giving notice to quit: but here it is entirely repugnant to the nature of a tenancy from year to year, such as this is contended to be, that the option of determining it should rest solely with the tenant.

GROSE, J. concurred.

LAWRENCE, J. If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life; which can only be created by deed, as a feoffment, or a conveyance to uses. The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord Mansfield, has been long exploded.

LE BLANC, J. The case of *Doe v. Bell* was considered as a tenancy from year to year, with all its consequences; though it was open to the same objection, that the lessor had in effect agreed not to give notice to quit during the seven years for which the agreement purported to have been made.

Rule discharged.

Garrow and *Comyn* were to have opposed the rule.

Hume v. Peploe.

8 East, 168. Jan. 27, 1807.

A plea of tender *after the day of payment* of a bill of exchange, and *before action brought*, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff in respect to the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise.

THIS was an action by the indorsee against the acceptor of a bill of exchange for 57*l.* 15*s.* drawn the 21st of *January*, 1806, payable at six months after date. Plea—that the plaintiff ought not to maintain his action thereof against the defendant to recover *any more or greater damages than 59*l.* 12*s.* 6*d.** in this behalf: because that *after making the promise, &c.* and *after the expiration of the time* appointed for the payment of the said bill of exchange, and *before* this action commenced, viz. on the 19th of *November* 1806, he was ready and willing, and then tendered to pay to the plaintiff the said 59*l.* 12*s.* 6*d.* then being the *whole money* which had become due, or was then owing or payable by the defendant to the plaintiff, upon and in respect of the said bill of exchange, with lawful interest thereon, for or in respect of the damages sustained by the plaintiff by reason of the non-performance of the said promise. The defendant then averred, that he *always from the time of the making of the said tender* to the plaintiff of the 59*l.* 12*s.* 6*d.* hitherto hath been, and still is ready to pay to the plaintiff the said 59*l.* 12*s.* 6*d.*; and now brings the same into court, &c. Replication—that after making the said pro-

mise, and when the bill became due and payable, it was presented for payment to the defendant, who was required to pay it; but that the defendant did not pay it, but wholly made default, &c. The rejoinder, admitting such default, stated that *after* the bill had been so presented for payment, and *after such default*, and *before* this action commenced, the defendant *tendered* to the plaintiff the said 59*l.* 12*s.* 6*d.* now brought into court, in manner and form as in the plea alleged; the said 59*l.* 12*s.* 6*d.* then being the *whole* money which had become or was then due, owing, or payable by the defendant to the plaintiff upon or in respect of the said bill, with lawful interest thereon from the time of the aforesaid default in payment thereof, for or in respect of the *damages* sustained by the plaintiff by reason of the non-performance of the said promise: and that the plaintiff did not, at any time *after* the making of the said tender of the 59*l.* 12*s.* 6*d.* and before this action commenced, demand payment of the same or any part thereof. To this there was a general demurrer, and joinder.

Lord ELLENBOROUGH, C. J. stopped *Hobroyd*, who was to have argued in support of the demurrer, and asked the defendant's counsel if he could shew any case where an averment of *tends tempus prius* was holden not to be necessary in a plea of tender: It was expressly decided to be necessary in *Giles v. Hartis*,^(a) and was one of those land marks in pleading that ought not to be departed from. The defendant has been guilty of a neglect, in non-payment of money at a certain day, upon which a cause of action arises to the plaintiff. It is no answer to shew that at a day subsequent he was ready to have paid it, unless he were always ready to have paid it from the time when it first became due. And no injustice is done; because the defendant may get relief by application to the Court for leave to pay the principal and interest into court; after which the plaintiff proceeds at his peril.

Lawes, for the defendant, admitted the inefficiency of such a plea in any case where the damages were arbitrary, and could only be ascertained by the intervention of a jury: but urged, that where the damages were the subject of mere computation, as in this case, the interest which had accrued from the dishonour of the bill, there was no reason why they should not be the subject of a tender; and if the plaintiff had sustained greater damages than the loss of interest by reason of the defendant's default, he should have replied that; instead of which he admits by his demurrer, that the sum tendered was the whole money which had become due in respect of the bill, with lawful interest from the time of the default, *in respect of the damages* sustained by him by reason of the non-performance of the defendant's promise. And the tender is pleaded not in bar of the action, but only in bar of ulterior damages.

Lord ELLENBOROUGH, C. J. The same argument would serve in support of every case of a tender after the cause of action arose, and before the action commenced: But in strictness, a plea of tender is applicable only to cases where the party pleading it has never been guilty of any breach of his contract; and we cannot now suffer a new form of pleading to be introduced different from that which has always prevailed in this case. The damages indeed have sometimes varied as the rate of interest has been changed. And though the Court have adopted the practice of referring it to their officer to compute principal and interest on bills of exchange, instead of sending it to a jury to make the same computation; yet that is always a matter in the discretion of the Court, and not to be obtained without motion.

LAWRENCE, J. This is a plea in bar of the plaintiff's demand, which is for damages; and therefore it ought to shew upon the record that he never had any such cause of action: but here the plea admits it.

Per Curiam,

Judgment for the Plaintiff.

(a) 1 Lord Raym. 254, and vide *Wood v. Ridge*, Fort. 376.

Pitcher v. Bailey.

8 East, 171. Jan. 27, 1807.

If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action.

CLOSE, an officer of the Marshalsea Court, having arrested the defendant upon a writ at the suit of one *Pidgeon*, afterwards set him at large upon his promising to pay *Pidgeon* immediately; instead of which he absconded, and *Close* was obliged to satisfy *Pidgeon's* demand. *Close* afterwards became insolvent; and the plaintiff, as his assignee under the insolvent debtor's act, brought this action against the defendant for money paid by *Close* to his use. But Lord *Ellenborough*, C. J. upon the authority of *Eyles v. Faikney*,^(a) nonsuited the plaintiff at the last sittings for *Middlesex*, upon the ground that the officer could not raise any cause of action by the payment of money for another, on account of his own breach of duty.

Park now moved to set aside the nonsuit; stating that there were conflicting authorities upon the subject: the opinions of *Yates*, J. and *Gould*, J., in a case^(b) before that of *Eyles v. Faikney*, being in direct variance to the latter; and that of *Buller*, J. in *Cordron v. Lord Masserene*, immediately afterwards, also trenching upon it: and no reasons being assigned in the report for the determination of the Court in that case. And supposing the question to be still open, he urged that there was no corrupt motive in the officer in permitting the defendant to go at large: and though it were an escape in law, so as to make him liable to the plaintiff in the original suit; yet it did not lie in this defendant's mouth to make the objection, on whose promise to pay the debt he had been liberated by the officer.

But all *The Court* agreed, that the case of *Eyles v. Faikney* was well decided, and governed the present: and that an officer guilty of a breach of duty could not recover money which he had paid in consequence of it, though for the benefit of the defendant.⁽¹⁾ Rule refused.

(a) E. 32 G. 3. B. R. referred to in a note to *Gordon v. Lord Masserene*, Peake's Ni. Pri. Cas. 144.

(b) Cited in Peake's Ni. Pri. cas. 144. According to my note of the case of *Eyles v. Faikney*, the case there referred to of *Morris v. Berkley*, Worcester Spring Assizes 1765, before *Yates*, J. was an action against a sheriff for an escape; wherein the learned judge said, that if a sheriff voluntarily permit an escape, and be afterwards obliged to pay the debt, he may maintain an action for money paid against the debtor. And so, he said, it had been determined in another case before him, where he had called in the assistance of Mr. Justice *Gould*, and they had both sat to try the cause. As the Court, however, in *Eyles v. Faikney*, seemed to be clear that that opinion in the extent of it could not be law; it was contended by the counsel, in support of the rule for a new trial, that the circumstances of the case shewed that the escape in question was a negligent and not a voluntary escape. After which, Lord *Kenyon* asked the defendant's counsel who was to oppose the rule, whether he had any objection to put the case in the shape of a special verdict. But the counsel contended that he was at all events entitled to discharge the rule; for whatever the doubt might be as to a negligent escape, this was a voluntary one; being the voluntary act of the gaoler, whatever his motive might be. And on this ground the Court said, that at any rate the rule must be discharged.

(1) [See acc. *Miles v. Rickwins*, 2 Raw. 199. *Koons v. Seward*, 8 W. 369. But see *Cummings v. Klapp*, 5 W. & S. 511.—W.]

Cooke v. The Hundredors of Pimhill, in the County of Salop.

8 East, 173. Jan. 27, 1807.

The declaration in an action on the stat. 9 G. 1. c. 22. s. 8, to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "*town, village, or hamlet*," which are the words of the act,) *near the place, &c.*; yet as the law *prima facie* intends every *parish* to be a *vill* unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial, that the parish consisted of several villa, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict.

THIS was an action upon the stat. 9 Geo. 1. c. 22. s. 8, to recover the value of a stack of corn the property of the plaintiff, alleged to have been wilfully, maliciously, and feloniously set on fire, and consumed, *in the parish of Baschurch*, within the hundred of *Pimhill*, in the county of *Salop*, by some person or persons unknown to the plaintiff, in the night of *Thursday 21st of November 1805*: and the declaration averred, "that the plaintiff did within two days next after the committing of the said offence, and of the damage done as aforesaid, viz. on, &c. *at the parish* aforesaid, in the hundred and county aforesaid, *give notice* of the said offence and damage to divers of the inhabitants of the said *parish* within the hundred and county aforesaid, being near unto the said place where the said offence and damage were so committed and done as aforesaid, *according to the form of the statute*," &c. and so it proceeded to aver that the plaintiff, within four days after the said notice, gave in his examination on oath before a justice of peace, and complied with the other requisitions of the act. After verdict for the plaintiff, a rule nisi was obtained in the last term for arresting the judgment, on the ground that the declaration had not pursued the words of the statute, in averring that the plaintiff, within two days next after the offence committed, gave notice of it to the inhabitants of some *town, village, or hamlet* near the place, &c.; but only averred such notice to have been given to the inhabitants of the parish near to the place; which might be in a distant part of the *parish*, and to inhabitants living dispersed in retired situations, who might have no means of ascertaining the truth of the fact.

Dauncy and *Wigley* now shewed for cause, that every *parish* is in law intended to be a *vill*, unless the contrary appear; and cited 4 Com. Dig. tit. Parish, (C. 1.) referring to Co. Lit. 125(b); *Wilson v. Laws*, M. 6 W. 3, referred to in *Rudd v. Morton*, Salk. 501; *Wray v. Vesper*, Cro. Jac. 263; *Lawrence v. Johns*, Ib. 274, and *Vale v. Field*, Ib. 340: and this being after verdict the Court will presume that every thing was proved necessary to sustain the declaration, (a) and consequently that *Baschurch* was proved to be one entire vill; especially as the notice is alleged to have been given "according to the form of the statute."

Williams Serjt. and *Abbot* in support of the rule, said that the statute in question, though remedial as to the plaintiff, was strictly a penal law as to the defendants, and to be construed accordingly. (b) The object of requiring the notice to be given was to make the transaction immediately notorious, as well for the prevention of fraudulent charges, as to raise the country by hue and cry upon the felons, where a felony was actually committed. This could not so well be answered by requiring notice to be given to the inhabitants of the *parish* near to the place, as to the inhabitants of some near *town, village, or hamlet*; which are the words of the act, all of them properly descriptive of a collection of houses and inhabitants, and not of a mere ecclesiastical division,

(a) *Hitchen v. Stevens*, 2 Show. 233, and vide, *Rushton v. Aspinall*, Dougl. 681. 3.

(b) *Norris v. The Hundred of Gavtry*, Hob. 139.

like a *parish*: the act itself therefore, by using those words, and omitting the word *parish*, has in terms as well as in reason distinguished between them; which rebuts the common presumption of law prevailing in the cases of venue, which have been cited, where it was unnecessary to distinguish between a vill and a parish. And if this be the true construction of the statute in question, the verdict will not help, nor the general allegation that notice was given "according to the form of the statute."

LORD ELLENBOROUGH, C. J. After verdict every thing shall be intended to have been proved which is alleged in the declaration: and here the question is, whether there be not a sufficient allegation of notice to satisfy the requisition of the act? It is stated, that the notice was given to divers inhabitants of the *parish* near the place; which, it is objected, ought to have been averred to be given to the inhabitants of the *vill*. But it has been decided by a variety of cases, that every *parish* shall *prima facie* be intended to be a *vill*, unless the contrary be shewn. We must then presume, that the judge who tried the cause, in receiving proof of the allegation that notice was given to the inhabitants of the *parish*, received evidence of notice having been given to the inhabitants of the *vill* of *Baschurch*. That might have been rebutted at the trial, by shewing that the parish contained several vills, and that the notice was not given to a near vill, but to one at a distance from the place where the fact was committed; which would be a bad notice. But that must be shewn; we cannot intend that such evidence was given. If however it were necessary to go further into that subject, there are allegations on the record, (not the mere allegation that the notice was given "according to the form of the statute,") that after verdict would lead to the presumption that such notice as the statute requires had been given in this case: for it is averred, that notice was given to the inhabitants of the parish "*near to the place, &c.* according to the form of the statute." But without resorting to that, there is a competent allegation on the record of notice given to that place, which the Court and jury are *prima facie* to presume to be a *vill*, unless the contrary be shewn to them.

GROSE, J. The question is, whether that which is averred be not tantamount to an averment that notice was given to the *vill* near the place, &c.? It is admitted that a *parish* may be a *vill*; and if so, and the statute requires notice to the vill, it was a question to be considered at the trial, whether the notice proved were notice to a vill; and if it were not, there would have been a verdict for the defendants. After verdict, therefore, for the plaintiff, we must presume that *Baschurch* was proved to be a vill.

LAWRENCE, J. After verdict, that which is alleged must be taken to have been proved: which is, that notice was given to the inhabitants of the parish of *Baschurch*, which the law *prima facie* presumes to be a vill, unless the contrary be shewn.

LE BLANC, J. If proof had been offered at the trial, that the parish of *Baschurch* consisted of several vills, and that the notice had been given to a distant vill, it would not have been proof of such a notice as the statute requires, and there would have been a verdict for the defendants.

Rule discharged.

Phillips v. Davies.

8 East, 178. Jan. 27, 1807.

In an action on the stat. 2 & 3 Ed. 6. c. 13, for the treble value of tithe corn, omitted to be set out, it is not enough for the defendant to shew the existence, in *fact*, of a custom in the parish to set out the 11th instead of the 10th mow, for the validity, as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him.

THIS was an action on the stat. 2 & 3 Ed. 6. c. 13, by the impropiator, to recover the treble value of the tithe of corn omitted to be set out by the defendant. At the trial before *Le Blanc*, J. at *Shrewsbury*, the defence set up was a custom to set out the eleventh mow of corn, instead of the tenth: and after this had been established by many witnesses as the custom which had in fact always prevailed in the parish, (according to which custom the tithe had in this instance been set out;) and it appeared to the learned judge, that there was a real question of right to be tried between the parties, he nonsuited the plaintiff, on the ground, that an action to recover a penalty was not a proper form of action to try a substantial question of right, but that this fell within the principle of those cases^(a) on the game laws, where it had been determined that a question of boundary between two manors should not be permitted to be tried in an action for a penalty.

Williams, Serjt. moved in the last term to set aside the nonsuit; and argued that, whether or not the rule had been properly laid down in those cases on the game laws, at any rate it did not apply to the present case: for the 4th section of the act looks to the trial of questions of right, and provides that no person shall be compelled to pay tithes for any lands, which by statute, or by any privilege or prescription, are not chargeable with such tithes, or that shall be discharged by any composition real. To ascertain such privileges, therefore, it is necessary to enter into evidence of them upon the trial: and so it is considered by Lord *Coke*, 2 Inst. 651, &c. And if one sort of exemption may be given in evidence, there is no reason for excluding evidence of any other. In *Buller's Nisi Prius*, 188, &c., the different kinds of defence are enumerated.

When the report was made, and cause was to have been shewn in this term by *Dauncey* and *Abbott*,

LE BLANC, J. Having consulted with the rest of the Court, said, that he had been misled at the trial by the supposed analogy between this case and those upon the game laws: but upon consideration there appeared to be these material distinctions between them. This is an action by the party grieved who is the owner of the tithes; whereas actions for penalties on the game laws are brought by common informers. Also questions of boundary and of manors are triable in other actions, more appropriate to the trial of such questions than an action for a penalty; but this action for the treble value on the statute of Ed. 6, is the only common law remedy for asserting the party's right to take the tithes.

The other Judges concurred in opinion that the validity of the custom was fit to be tried in this action; which it was observed had not been determined; the trial having been stopped before it had gone to that extent.

Rule absolute.

(a) Vide *Calcraft v. Gibbs*, 4 Term Rep. 681, and the cases there cited; but in the principal case the nonsuit was set aside, because the defendant had no pretence of claim to the manor.

The King v. Tomkins.

8 East, 180. Jan. 28, 1807.

It is not enough, in an order for remanding an insolvent debtor by the sessions, to state that it appeared that he had obtained goods of *A. B.* (at whose suit he was detained) by false pretences; for either it should be stated in the words of the stat. 41 G. 3. c. 70. s. 40, (by virtue of which the order was made) that the party *knowingly and designedly* by false pretences obtained the goods; or at least, that he *fraudulently*, by false pretences, obtained them; the description of the offence adopted by the stat. 46 Geo. 3. c. 108. s. 39, with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former act.) And a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of an insolvent debtor, on due proof of such former offence described in the statute, though he were not a creditor at the time of such former order of remand made.

THE defendant obtained a rule for the prosecutors to shew cause why an order of sessions (returned into this court by *certiorari*) remanding the defendant into the custody of the marshal of the K. B. prison, should not be quashed for insufficiency. The order, which was made at the *Surry Sessions* on the 25th of *August* 46 Geo. 3, stated that "whereas *R. Tomkins* late of, &c. merchant, but now a prisoner for debt in the K. B. prison, at the suit (amongst others) of Messrs. *Thompson*, &c. hath now applied to this Court, to take the benefit of the stat. 46 Geo. 3, for the relief of certain insolvent debtors; now it appearing to this Court, *by an order made at the general session of the peace holden for the city of London* by adjournment, at the *Guildhall*, &c., on the 10th of *August* 41 Geo. 3, that the said *R. Tomkins* was remanded to the prison of the *Fleet*, &c., under an act passed in the 41 G. 3, for the relief of certain insolvent debtors, *for having fraudulently obtained goods of J. K. and E. P. on false pretences*; and which order is as follows, viz.—*London*. At the general sessions, &c., on the 10th of *August*, 41 Geo. 3, *R. Tomkins* a prisoner for debt, in the custody of the warden, &c. of the *Fleet*, &c.: being brought before the justices, &c., by the said warden, by virtue of a warrant, &c. issued in that behalf, on the petition of the said *R. Tomkins*, in order to take the benefit of the act, &c. for the relief of certain insolvent debtors: but it appearing to this Court *that he obtained goods, value 113*l.* of J. K. and E. P.* (at whose suit, amongst others, he is detained,) *by false pretences*; he is therefore for and on account thereof remanded back to the said prison of the *Fleet*, &c. to be detained until he shall be discharged by due course of law," &c.—It is ordered by this Court, that the said *R. Tomkins* be, and he is hereby remanded into the custody of the marshal of the said prison of the K. B."

The recited order of sessions of the 10th of *August* 1801, remanding the defendant into custody, (on which the last order was founded) was made upon the 40th section of the prior insolvent debtor's act of the 41 Geo. 3. c. 70; which, reciting, that "evil disposed persons, to support their profligate way of life, have, by various subtle stratagems, threats, and devices, *fraudulently* obtained money, goods, &c. to the great injury of industrious families, and to the manifest prejudice of trade and credit; enacts that no prisoner, who *knowingly and designedly*, by false pretence or pretences, shall have obtained from any person money, goods, &c. shall have any benefit or discharge under this act." And by s. 52, in order that the objection for which the discharge was refused may be clear and certain, the justices are required to state it. The last order of remand in question was made upon the last insolvent debtors act of the 46 Geo. 3. c. 108, the 39th section of which provides "that no prisoner who shall have been remanded to prison, under any act heretofore passed for the relief of insolvent debtors, for having *fraudulently* obtained money, goods,

&c. on false pretences, shall have any benefit or discharge under this act." And this is followed by a similar direction (s. 51,) as in the former statute.

Marryat, in moving for the rule in the last term, objected to the last order, as founded altogether upon the prior order of remand, which did not state a sufficient case within the statute 41 G. 3. c. 70, to warrant it. 1st, In not stating that the defendant had *knowingly and designedly, or fraudulently*, by false pretences obtained the goods; which is the description of the offence mentioned in the 40th section. 2dly, In not stating what the false pretences were, which is required, *Rez v. Mason*, 2 Term Rep. 581, in an indictment on the stat. 30 Geo. 2. c. 24, containing the same description of offence.

Laves, now shewed cause, and said, that every intendment should be made in support of an order of justices, *Rez v. Clayton*, 3 East, 58, though not of a conviction; and this is of the former description. Therefore the Court will intend that the justices making the former order of remand had satisfactory proof that the defendant had *knowingly and designedly* obtained the goods by false pretences; for the stat. 41 Geo. 3. c. 70. s. 40, does not use the word *fraudulently* in the enacting part. But the order in question, now sought to be set aside, has the word *fraudulently*; which the last insolvent debtor's act, on which that order was founded, uses as descriptive of the offence in the prior statute.

The Court however observed, that the last order professed to have been made merely upon the foundation of the former order of remand; and if that were bad upon the face of it, the order in question must also fall to the ground. But the effect of this, they said, would not be to direct the discharge of the prisoner; for if this order were quashed, it would still be open to the prosecutors when he was brought up again to the sessions to be discharged, to shew that he had been guilty of any practices which would warrant their remanding him under the provisions of the act.

Laves thereupon intimated, that an objection had been taken, and much pressed at the sessions, that it was not competent to any persons to oppose the prisoner's discharge on account of such former mal-practices, unless they were creditors at the time; which might apply to those who would oppose his discharge on a future occasion.

LORD ELLENBOROUGH, C. J. There is no foundation for the objection taken at the sessions, that the party objecting to the prisoner's discharge for such mal-practices should have been a creditor at the time. For the legislature did not furnish that ground of objection on account of the interest of the particular creditor who urges it, but on public policy, to prevent a person guilty of such immoral conduct from being let loose again upon the public to continue his depredations. We may therefore hope, that this objection will not be started again. There was also another objection taken, founded upon *The King v. Mason*, which need not be repeated on any future occasion; namely, the not stating what the false pretences were for which the prisoner was remanded: for that was the case of an indictment upon the statute of Geo. 2, where it was holden to be necessary to state what the false pretences were, in order to give the party an opportunity of knowing against what he was to defend himself. But the other objection to the recited order, on which the order in question is bottomed, is clearly valid for the defect pointed out, in not stating that the false pretence was made *knowingly and designedly*, as the former act describes it, or at least *fraudulently*, as the offence is described in the latter act. A man may innocently obtain goods on a pretence which is false, if he do not know that it is false: as if a servant, ignorant of the deceit, be sent by his master for goods upon a false pretence, which he directs him to make.

Per Curiam. Let the order of sessions be quashed: and the objection will be left entire, to be substantiated by competent evidence when the party is brought up again before the sessions.

Doe, on the Demise of Lockwood v. John Clarke and Brown.

8 East, 185. Jan. 28, 1807.

Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease: held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry, the continuance of the term itself being made to depend upon the lessee's actual occupation.

IN this ejectment, tried before *Heath, J.* at the last assizes for *Essex*, it appeared that *Lockwood* had leased the premises in question, a farm house and land, on a lease, dated 16th *January* 1800, to *Thomas Clarke*; "*habendum* from *Michaelmas* 1800, for 21 years, if the said *T. Clarke* and his executors, &c. should so long continue to inhabit and dwell with his and their family and servants in the said farm-house, and he, his executors, &c. should so long continue actually to hold and occupy the said farm, lands, and premises, and not let, set, assign over, or otherwise depart with this present lease, or the farm and premises or any part thereof, to any person whatever." There was also a covenant not to under-let, sell, assign, or otherwise depart with the demised premises or any part thereof. And there was a proviso, "that if any of the said covenants should be broken, the lessor might re-enter, and from thenceforth the said lease should cease and be void." It was proved that *Thomas Clarke* became a bankrupt, and that the defendants, as his assignees, and with his approbation and consent, sold the lease for 1200*l.* And that one *Wright*, by the appointment of the defendant *Brown*, managed the farm as his bailiff or agent. There was other evidence in the cause offered to shew other breaches of covenant; but no question was raised on them; and a verdict was taken for the plaintiff; reserving the question, whether this were such an assigning over, &c. or otherwise departing with the lease as entitled the lessor of the plaintiff to recover.

Curwood, in the last term, obtained a rule nisi for setting aside the verdict; and then stated another objection, which he conceived to have been reserved; that this was the case of a forfeiture for a condition broken, and that the lessor should have re-entered before he brought his ejectment.

The Court, however, on hearing the report of the learned judge now read, were clearly satisfied that there was no foundation for any objection; and they stopped *Garrow*, who was to have opposed the rule. And it was only now suggested by *Curwood*, that this was an assignment *in invitum*, which ought not to prejudice the tenant.

LORD ELLENBOROUGH, C. J. If at the time of the ejectment brought, *Thomas Clarke*, the bankrupt, had ceased to continue dwelling in the farm-house, and no longer had the actual occupation of the farm, the lease of which had been actually sold by the assignees, and another person had the management of it, it is clear that there was an end of the term, which was only made to endure so long as the tenant, who is still living, continued in the actual occupation of the premises. This is not the case of a forfeiture; but his actual occupation is a condition annexed to the lease: and it was considered in *Doe v. Carter*, (a) as a settled point, that such a condition would be good to determine the lease in cases of bankruptcy.

LAWRENCE, J. If this had been a question of forfeiture, there might have been something in the objection; but here the term itself is made to continue and depend upon the personal occupation of the lessee. It is like the case of

(a) 8 Term Rep. 57, and 300, where all the prior cases are collected. And vide *Doe v. Hawke*, 2 East, 481.

a lease for 21 years, if the lessee should so long live; there if he died before the 21 years run out, there is an end of the term. Here the lease in effect is for 21 years if *Thomas Clarke* shall so long live in the house. Then if he has ceased to live there, from whatever cause, the condition on which the term was made to determine has happened, and there is an end of his interest in the premises.

The other judges concurring.

Rule discharged.

Elden Administrator of Elden v. Keddell.

8 East, 187. Jan. 28, 1807.

The original book of acts directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another; the first not being recalled.

THE plaintiff brought an action for money had and received to his use, as administrator of his father, under letters of administration dated in *June* 1806; and proved by a broker who was employed in 1791, soon after the intestate's death, to value his property, that he had valued effects in a public house which had been kept by the intestate, and that the publican who succeeded him had paid 113*l.* for them into the hands of the defendant, a brewer, who had supplied the house with beer, and who appeared to act on the occasion as the friend of the intestate's widow. And by another witness it appeared, that the defendant was a creditor of the intestate to a larger amount than the sum so received. On the part of the defendant it was proved, that immediately after the intestate's death in 1791, his widow went to the surrogate's office at *Rochester* for the purpose of administering to his effects. And the proper officer produced in evidence the original book of acts, with the fiat of the surrogate for letters of administration to be granted to her. The entry was as follows.—“*Elden Edw.*—On the 18th day of *April* 1791, “power was granted to *Elizabeth Elden*, the lawful widow and relict of *Edward Elden*, late of the parish of *Chalk*, in the county of *Kent*, victualler, “deceased, to administer the goods, chattels, and credits of the said deceased, “she having been first sworn duly to administer. Till the last day of *July*, “to exhibit an inventory.” “Same day bond from *Elizabeth Elden*, widow, “*Matthew Dawson* and *John Clay*, under 100*l.*” But as the letters of administration themselves were not produced, nor evidence of any search having been made for them since the widow's death, the evidence tendered was deemed insufficient, and a verdict for 113*l.* passed for the plaintiff at the trial before *Macdonald*, C. B. at the last assizes for *Kent*, with leave to the defendant to move for a new trial. And a rule *nisi* for setting aside the verdict having been obtained in the last term. *Best*, Serjt. and *Laves* appeared now to shew cause against it; and *Garrow* and *Bayley*, Serjt. in support of it. But on hearing the report read,

LORD ELLENBOROUGH, C. J. said, that it could not be questioned but that the original book of acts of the Court, which was the authority for the proper officer afterwards to make out the letters of administration, was proper evidence of the title of the widow: for the letters of administration were only the copy of the original minutes of the court, drawn up in a more formal manner. That he had known this evidence produced on other occasions. And, in answer to a suggestion, that by the grant of the subsequent letters of administration to the son it was to be presumed that the administration before decreed to be granted to the widow was recalled or cancelled; he said it was

enough that administration *de facto* was granted to the widow, pending which the money may have been paid to the defendant by her authority.(1)

Per Curiam,

Rule absolute.(a)

Goodwright, on the Demise of Peters, v. Vivian.

8 East, 190. Jan. 29, 1807.

If *trees* be excepted out of a demise, *waste* cannot be committed by cutting them down; and therefore ejectment cannot be brought as for *waste* committed in or upon the demised premises.

THIS ejectment, to recover possession of an estate in the parish of *Phil-leigh*, in *Cornwall*, was brought upon the ground of a forfeiture, alleged to have been incurred by the defendant's committing waste in cutting down *timber trees*, contrary to a proviso in the lease under which he held the premises. The lease contained, amongst others, this exception; "*Except and always reserved out of these presents and the demise and lease hereby made, all trees of oak, ash, and elm, now growing, or hereafter to grow in or upon the said demised premises, or any part thereof.*" It also contained a proviso, that if the defendant should commit any *waste in or upon the said demised premises*, it should be lawful for the lessor to re-enter." The plaintiff's witnesses proved at the trial, that the trees in question of the description mentioned, and in number about 20 or 30, grew in a coppice wood of an acre and a half, *parcel of the demised premises*, and were disposed of, while standing, by public sale, together with the coppice wood, and were by the purchaser cut down, or barked for the purpose of cutting. Some of the trees grew from old stools; others were maiden trees, some above 40 years growth; but all were 24 inches or upwards in girth, which, by the custom of that country, are deemed timber. The jury found a verdict for the plaintiff on the merits: but as it appeared by the lease, that all the *trees of oak, &c.* were *excepted* out of the demise, the question whether they could be the subject of waste was saved to the defendant; with liberty to move to enter a nonsuit, if the Court should think the action not maintainable. Such a rule was accordingly moved for in the last term, when several authorities were cited by *Gaselee*, to shew that waste could not be committed upon any subject matter excepted out of the demise. 11 H. 4. 32, b. noted in 22 Vin. Abr. 448, tit. Waste G. pl. 8, Dy. 19, a. pl. 110, cites E. 20 Eliz. C. B. Bull. N. P. 119. In *Levknor v. Ford*, 1 Leon. 48, the only question was, whether the exception of the trees by the lessee in his assignment were good.

Dampier (Lens, Serjt. was with him) now shewed cause against the rule, and contended, on the authority of *Whilster v. Paslow*, Cro. Jac. 487, that only the trees themselves, and not the soil, were excepted; which was shewn further by the reservation to the landlord of free ingress and regress to cut down and remove the trees. And therefore the soil, for which the ejectment was brought, might be forfeited. In *Lord Rich v. Makepeace*,(b) though trees

(1) Vide *Davis v. Williams*, 13 East, 232.

(a) Vide Bull. N. P. 246, which cites *Garrett v. Lister*, 1 Lev. 25, where this point was ruled; contrary to Bull. N. P. 108, referring to *Lewis v. Brag*, M. 16 Geo. 2. cor. Lee, C. J. at *Guildhall*; where it is said, that the administrator shall not be permitted to give such book, or a copy of it, in evidence, unless he have proved the administration under the seal of the Court lost.

(b) Noy, 29. This case was also cited to shew, that if the lessee cut any tree, *waste* would lie as well for the loppings as for the body of the tree: and so the case is stated in 22 Vin. Abr. 441, but the word *waste* is interpolated in the latter book; for the report runs thus, "If he cut any tree, it shall be (some word omitted, probably *trespass*) as well for the loppings as for the body of the tree." This was adverted to by the defendant's counsel.

were excepted, it was determined that the lessee had liberty to take the lop-pings for fireboot. [Lord *Ellenborough*, C. J. I do not understand how, if the trees were excepted, the lessee could be entitled to any part of the trees, without some other words.] At least he has an interest in the shade of the trees. Then the effect of cutting down the timber is to alter the nature of the ground, and to convert wood into coppice, thereby destroying the evidence of the land, which of itself is waste; as if he convert arable into wood, or wood into meadow. Co. Lit. 53 b.

The Court however, without hearing the defendant's counsel, were clearly satisfied that waste could only be committed of the thing demised: and here the trees being excepted out of the demise no waste could be committed of them, and consequently no forfeiture could be incurred by cutting them down, within the provision of the lease. That as to altering the evidence of the land, the cutting down of an adjoining wood, on which the demised close was described as abutting, might as well be contended to be waste.

Rule absolute.

Sir V. Gibbs, *Burrough*, and *Gaselee*, were to have supported the rule.

The King v. Luffe.

8 East, 193. Jan. 31, 1807.

1. An order of bastardy stated to be made upon the oath of the wife, *as otherwise*, is good; for it will be presumed that the non-access of the husband was proved by competent witnesses on oath other than the wife; or if proved by her also, that the judgment of the justices was founded on the other proof.
2. Such an order filiating the child of a married woman is good, though it only state that such child was *likely to become chargeable*; which are the words of the stat. 6 Geo. 2. c. 31. s. 1, as applied to the bastards of single women; for upon that stat. as well as the stat. 18 Eliz. c. 3, which has the words *born out of lawful matrimony*, the only question is, whether the child be by law a bastard.
3. Non-access of the husband need not be proved during the whole period of the wife's pregnancy: It is sufficient if the circumstances of the case show a natural impossibility that the husband could be the father; as where he had access only a fortnight before the birth.

AN order of bastardy returned into this court by *certiorari* was as follows. *Suffolk*, to wit.—The order of S. K. and J. H. two of H. M. justices of the peace, &c. made the 20th of August 1806, concerning a male bastard child lately born in the parish of *Benhall*, (in the said county) on the body of *Mary Taylor*, wife of *Jonathan Taylor* late of B. aforesaid, mariner. Whereas it appeareth unto us, the said justices upon the oath of the said *Mary Taylor* as otherwise, that her husband hath been beyond the seas, and that she did not see her husband, or had access to him from the 9th of April 1804, until the 29th of June last past: And whereas it hath also appeared unto us, the said justices, as well upon the complaint of the churchwardens, &c. of *Benhall*, as upon the oath of the said *Mary Taylor*, that she, the said *Mary Taylor*, on or about the 13th of July now last past, was delivered of a male bastard child in the said parish of *Benhall*, and that the said male bastard child is likely to become chargeable to the said parish of *Benhall*: And further, that *H. Luffe*, of *Benhall*, &c. did beget the said bastard child on the body of her, the said *Mary Taylor*: And whereas the said *H. Luffe* hath this day appeared before us, but hath not shewn any cause why he should not be adjudged the reputed father of the said bastard child: We therefore, upon examination of the cause and circumstances of the premises, as well upon the oath of the said *Mary Taylor* as otherwise, do hereby adjudge him, the said *H. Luffe*, to be the reputed father of the said bastard child; and do also adjudge that the said bastard child was born in the said parish of *Benhall*. And thereupon we do order, as well for the better relief of the said parish of B. as for the sustenta-

tion and relief of the said bastard child, that the said *H. Luffe* shall forthwith, upon notice of this our order, pay to the said churchwardens, &c. of the said parish of *B.* 2*l.* 3*s.* 6*d.* for and towards the lying in of the said *Mary Taylor*, and the maintenance of the said bastard child, to the time of making this our order. And we do also hereby further order, that the said *H. Luffe* shall likewise pay to the churchwardens, &c. of the parish of *B.* for the time being 3*s.* weekly, &c. for the maintenance, &c. of the said bastard child, so long time as the said bastard child shall be chargeable to the said parish of *B.* And we do further order, that the said *Mary Taylor* shall also pay, or cause to be paid to the said churchwardens, &c. of the said parish of *B.* for the time being, 1*s.* 6*d.* weekly, so long as the said bastard child shall be chargeable to the said parish of *B.* in case she should not nurse and take care of the said child herself." (Signed and sealed by the justices.) The defendant appealed against the order to the quarter sessions, by which court it was confirmed.

Three objections were taken to this order; (a) 1st, That the wife was admitted to prove the non-access of her husband. 2dly, That this being the child of a married woman, the justices had no jurisdiction to make an order of filiation, unless the child appeared to have been actually chargeable, and not merely likely to become so. 3dly, That the non-access of the husband was not proved during the whole time of the wife's pregnancy; which was necessary to bastardize the issue.

Storks shewed cause against the rule for quashing the order. As to the first objection; the non-access of the husband does not rest upon the evidence of the wife alone; nor does it even necessarily appear that she gave any evidence of that fact. The words of the order are, that it appeared to the justices, *upon the oath of the said Mary Taylor, as otherwise*, (by which must be understood other legal proof,) that her husband had been *beyond sea, and* that she had not seen him, *or* had access to him, &c. And the words *as otherwise* occur again in the subsequent part of the order. It was long ago decided in *Pendrell v. Pendrell*, 2 Stra. 925, and *Rez v. Bedall*, ib. 941. 1076. Rep. Temp. Hardw. 379, and Andr. 9, that non-access may be proved to bastardize the issue, though the husband be in *England*; and the old doctrine of the *Quatuor Mariae* (b) was agreed to be exploded. And in the latter case, the order being stated to be made "*on the examination of the wife and on other proof*," it was holden to be good; though it was agreed that the evidence of the wife alone to prove non-access would not have been sufficient, according to the case of *The King v. Reading*; but that she was a witness from necessity to prove the criminal conversation. It appears by the report of *Rez v. Reading*, (c) that the wife was the only witness to prove the non-access, as well as the criminal intercourse; and Lord *Hardwicke* said, "it would be of dangerous consequence to lay it down in general, that a wife should be a sufficient *sole* evidence to bastardize her child, and to discharge her husband of the burthen of its maintenance." Upon the authority of that case, the order was quashed in *The King v. Rooke*, 1 Wils. 340; it having been made upon the *sole* evidence of the wife as to the non-access. Both those cases therefore are distinguishable from the present. The 2d objection is grounded on this, that the stat. 6 Geo. 2. c. 31. s. 1, which gives jurisdiction

(a) The presence of the defendant in court was waived by consent. Vide *Rez v. Matthews*, Salk. 475.

(b) Vide Co. Lit. 244. a, and 123. b. to 125. 129, in which the whole doctrine is discussed in the notes.

(c) Rep. Temp. Hardw. 79. 2 Sess. cas. 175, and Andr. 10, *Ford's MS.* states the facts thus, "*John Alman* was husband of *Mary Alman*, and leaving her upon the 25th of May 1731, had no access to her from that time till the 25th of May 1733, upon which day she was delivered of a bastard child begotten by the defendant *Reading*: *all which was proved by the evidence of Mary Alman*. There were other witnesses who proved that the husband was within 7 miles of his wife during that time.

to magistrates to take examinations for making orders of filiation in case of bastards *likely to become* chargeable, is confined in terms to the bastards of *single women*. But this order would at any rate be good on the general statute of the 18 Eliz. c. 3, which gives the magistrates jurisdiction to filiate bastards "*begotten and born out of lawful matrimony*." And it was determined in *Rez v. Abertson*, 2 Salk. 483. 1 Ld. Ray. 395, and Carth. 469, that a bastard begotten on the body of a feme covert, while her husband was beyond the four seas, was "*begotten and born out of lawful matrimony*." And in *Rez v. Taylor*, 3 Burr. 1679, the mother of a bastard was after her marriage holden to be still liable to be committed for disobedience to an order of maintenance made under the statute of Elizabeth. According to *Rez v. Matthews*, 2 Salk. 475, and an anonymous case in 10 Mod. 84, it is not even necessary to state in the order that the bastard child is likely to become chargeable; for that, say the Court, will be presumed. And in *Rez v. Nelson*, 1 Ventr. 37, though it were agreed that it ought to appear by the order, that the child was likely to be chargeable; yet that, it was said, sufficiently appeared by the order to pay such charges as the parish had been at. As to the 3d objection, that the child was born after access of the husband; the birth of the child was on the 13th of *July* 1806, and the fact of non-access stands proved from the 9th of *April* 1804 until the 29th of *June* 1806: the access therefore of the husband was not till within about a fortnight before the birth; which renders it impossible, in the course of nature, that he could have been the father. In support of this objection were cited at the time *Regina v. Murray*, Salk. 122, and *Rez v. Abertson*, 1 Lord Ray. 395, to shew that non-access must be proved during the whole time of pregnancy, in order to bastardize the issue. But those cases were decided upon the ground of the old rule of the *quatuor maria*, now exploded by the subsequent cases of *St. Andrews v. St. Bride's*, 1 Stra. 51; *Pendrell v. Pendrell*, 2 Stra. 925; *Rez v. Lubbenham*, 4 Term Rep. 251, and *Goodright v. Saul*, ib. 356. Besides, the Court will presume every thing in favour of an order: and where it is apparent from the facts stated that the defendant is the father of the child, they will not, by quashing the order, make the husband liable to maintain it.

Wilson, Alderson, and King, contra. As to the first objection, it has been clearly settled since the *King v. Reading*, that the wife is not a competent witness to prove the non-access of her husband, though from the necessity of the case she is admitted to prove the act of adultery. And it is no answer to say, that she was not the *sole* witness; and that the fact of non-access may have been proved by other evidence, by reason that the order is stated to have been made upon her examination upon oath, *as otherwise*: for it expressly appears that the non-access was proved by her: And though it were also testified by other evidence, (which other evidence, however, does not necessarily appear to have been upon oath); yet the judgment of the magistrates, which must be taken to have been formed upon all the evidence taken together, cannot be sustained, if part of that evidence were incompetent to be received; for the Court cannot tell what degree of weight was given to her testimony as to the fact of non-access in coming to the conclusion. The 2d objection was only argued by some of the defendant's counsel, on the words, "*born out of lawful matrimony*," in the statute of Elizabeth, and on the words, "*single woman*," used in the st. 6 Geo. 2, neither of which, they said, applied to the illegitimate child of a married woman. But this objection, being discountenanced by the Court for the reasons after stated, was ultimately abandoned. 3dly, The law presumes access, and the proof of non-access must come from the party disputing the legitimacy. The mode of proof was formerly very plain and precise; for unless the husband were proved to be beyond the four seas, or labouring under some personal disability, the children were deemed legitimate. If, says Lord Coke, Co. Lit. 244, a. "the issue be born within a month, or a day after marriage, between parties of full lawful age, the child is

legitimate." The law, therefore, never looked to the period of conception, or to the actual possibility of the husband having begotten the child, but only to the notorious fact of its birth during the marriage, and while the husband was within the four seas. (a) The doctrine, indeed, of the *extra quatuor maria*, is now obsolete; and is supplied by the positive proof of non-access, though the husband be in *England*; but so much of the old rule of law still holds, that if access be proved at any time between the possible conception and the birth, the child is legitimate. So Mr. Justice *Blackstone*, 1 Blac. Com. 457, speaking of the old doctrine, says; "If the husband be out of *England* (or, as the law somewhat loosely phrases it, *extra quatuor maria*) for above nine months, so that no access to his wife can be presumed; her issue during that period shall be bastards. But generally (he adds, with reference to the later determinations engrafted on the old rule,) during the coverture, access of the husband shall be presumed, unless the contrary can be shewn; which is such a negative as can only be proved by shewing him to be elsewhere." [Lord *Ellenborough*, C. J. Suppose a husband, who had been out of reach of access during the whole period of the wife's possible gestation, returned to his wife the very instant before her actual delivery, can it be contended that the child would in such case be legitimate? The ground insisted upon in the case of *The Queen v. Murray*, was a little slurred by Mr. Justice *Lee*, in *The King v. Reading*. If the fact be once ascertained, that it is naturally impossible, (I do not say improbable merely) that the husband should be the father of the child, the conclusion follows, that the child is a bastard. There is a very early case of *Fozcroft* in the time of Ed. 1, (b) where an infirm bedridden man was privately married to a woman, who, within 12 weeks after, was delivered of a son; and the issue was adjudged a bastard. The principle to be deduced from the cases is, that if the husband could not by possibility be the father, that is sufficient to repel the legal presumption of the child's legitimacy.

(a) Many cases were referred to, which are collected in 4 Vin. Abr. 21. Letter B. pl. 3, 4, 5, and 6.

(b) E. 10 Ed. 1 B. Rot. 23. 1 Rol. Abr. 359. It is to be observed, however, that as the case is stated in Rolle, R. the infirm bedridden man was married to A. by the Bishop of London privately, in no church or chapel, nor with the celebration of any mass; "le dit A. Esteant adonque pregnant del dit R." &c. Now, if by the word *del* it be meant that A. was pregnant by the man whom she afterwards married (and the words are so construed in other abridgments); assuming that there was a marriage, the case is scarcely intelligible; for it is contrary to the whole current of decisions to say, that a child born after the marriage of its actual parents, if begotten before, is a bastard: And if R. were in truth the father of the child begotten some time before, it was a matter of no consequence how infirm of body he was at the time of his marriage, only 12 weeks before the birth; and yet stress is evidently laid upon this circumstance in the statement of the case. But if, by the mention of the privacy of the marriage, and that it was in no church, &c., it were meant to question its validity for want of a proper ceremonial, the infirmity of the man's body at the time was equally immaterial, and the case itself not worth noticing; as amounting only to this, that the issue of persons not married according to the requisite ceremonies of the law, or in other words, not married at all, are bastards. And if Lord Rolle had considered that to be the point in judgment, it is singular that he should not have drawn exclusive attention to it by some more appropriate turn of expression, than by saying that R. was married privately, &c. in conjunction with the other circumstances of the case. Quære then, whether there may not be some error of the pen, or of the press? For though the relative word *dit* supports the allusion to the husband R.; there being but one R. before mentioned; yet in abstracting the record, as it is likely enough that the son was of the same name with the supposed father, this error may have crept in without attracting attention. The word *del* properly signifies of, and pregnant *del*, &c. is pregnant of, &c. and not by, &c. And Lord Rolle, in other places under the same head, speaking of pregnancy, in relation to the husband or father, uses the phrases, "ensient per A." "ad issue per luy;" "ad issue per B.;" while the word *del* is plainly used in its common sense for of, in several sentences immediately preceding. And in this sense only, speaking of the woman as pregnant of R. the issue, is the case intelligible, or likely to have been noted in that place or manner; in which sense Lord *Ellenborough* seems to have read the case. There is no regular year book of this period to refer to, but only a few scattered notes, not including this case.

But if the mere fact of access of the husband at any time between the moments of conception and delivery would make the child legitimate, it would have been an answer to many of the cases where legitimacy has been in question.] No other certain time can be drawn than that laid down in *Regina v. Murray*, Salk. 122, and *Rez v. Albertson*, 1 Lord Ray. 395. Salk. 484. Carth. 469. In the latter case, it is said, "He is a bastard who is born of a man's wife while the husband, at and from the time of the begetting to the birth, is *extra quatuor maria*;" or, as it is now understood, is proved to have had no access during that period. And in the report of the same case in Carthew, the 3d exception to the order, on which it was quashed, was, that it was not alleged that the husband was beyond sea for 40 weeks before the birth of the child; and that it would not be sufficient to say that he was beyond sea at the time of the conception; because that in nature could not certainly be known. [Lord *Ellenborough*, C. J. Here, however, in nature the fact may certainly be known, that the husband, who had no access till within a fortnight of his wife's delivery, could not be the actual father of the child. Where the thing cannot certainly be known, we must call in aid such probable evidence as can be resorted to, and the intervention of a jury must, in all cases in which it is practicable, be had to decide thereupon: but where the question arises as it does here, and where it may certainly be known from the invariable course of nature, as in this case it may, that no birth could be occasioned and produced within those limits of time, we may venture to lay down the rule plainly and broadly, without any danger arising from the precedent.] The same case of *Rez v. Albertson* is reported in 5 *Modern*, 449,(a) and there *Holt*, C. J. is made to say, that it must appear that the husband was not here all the space; for if he were here either at the begetting or at the birth of the child, it is sufficient. And this falls in with the established rule of law, which has never been questioned, that if a man marry a pregnant woman any time before the birth of the child, such child is legitimate. Then by analogy to that, if the husband have access any time before the birth of the child, the same construction must prevail.

LORD ELLENBOROUGH, C. J. Three exceptions have been taken to this order; 1st, That the wife was examined generally, and alone, to the fact of non-access, and that the order is founded on her evidence only; whereas it is laid down in the cases, that an order of this sort cannot be made on the evidence of the wife alone, but that there must be other proof of the non-access. This objection is grounded upon a principle of public policy, which prohibits the wife from being examined against her husband in any matter affecting his interest or character, unless in cases of necessity, where, from the nature of the thing, no other witnesses can probably have been present: but exceptions of that sort have been established; and that it is necessary, and on that account allowable, to examine her as to the fact of her criminal intercourse with another, has been held by various Judges at different periods; for this is a fact which must probably be within her own knowledge and that of the adulterer only. And by a parity of reasoning, it should seem that if she be admitted as a witness of necessity to speak to the fact of the adulterous intercourse, it might also perhaps be competent for her to prove that the adulterer alone had that sort of intercourse with her, by which a child might be produced within the limits of time which nature allows for parturition. Certainly, however, it is competent for her to prove the fact of her connexion with that person whom she charges as being the real father of her child. And here the order is stated to have been made, not on her evidence only, but "upon the oath of the said *Mary Taylor*, as otherwise." It is true, that it is not said, "as otherwise upon oath;" but as no evidence can properly be given otherwise than upon oath, it is not going further in making an intendment to support this order than has

(a) Under the name of *Alenson v. Spence*.

been done in other cases, to say that such other evidence must also be taken to have been given upon oath. Now it does not appear to what particular facts the wife deposed, or what were proved by the other evidence: and then the rule laid down in *The King v. Bedall* applies, that if there were other witnesses besides the wife, and she were competent to prove any part of the case, the Court will intend, in support of an order framed like the present, that she was examined only as to those facts which she was competent to prove, and that the rest of the case was proved by the other evidence. And this is not more than has been intended in many other cases. We may therefore read the adjudicatory part of the order as made "upon examination, &c. of the premises upon oath, as well of the said *Mary Taylor*, as otherwise." (1) The 2d exception, which arose on the wording of the statutes of Elizabeth and George 2d, in effect resolves itself into the third. For when the question is, whether this were a child *born out of lawful matrimony*, that is, out of the limits and rights belonging to that state, it is the same in substance as the question, whether it be a *bastard*. It is so for the general purposes of the act. The matrimony does not cover the child if it be in *other* respects (according to the rule of law applicable to this subject) a bastard. And so it seems that a child born by adulterous intercourse is as much within the provision of the act of Geo. 2, as one which is born of a single woman. The cases of *The King v. Reading*, and *The King v. Bedall*, were both after the statute of Geo. 2, and yet no such objection was taken. It is a consequence which follows of course from establishing the *bastardy* of the child, that it was born *out of lawful matrimony*, in the proper sense of those words as applied to the subject matter. This brings it to the 3d and principal exception; that as it appears that the husband returned within access of the wife about a fortnight before the child was born, he must be presumed to be the father of it; which will throw upon him the burthen of its maintenance. As something has been said concerning the novelty of the doctrine of admitting the proof of non-access to the husband living within the kingdom, in order to rebut the presumption of legitimacy, let us see how the law was understood to be in early periods. In 1 Rol. Abr. 358, tit. *Bastard*, letter *B.* it is said, "By the law of the land no man can be a bastard who is born after marriage, *unless for special matter.*" Therefore, in the very text of the rule an exception is introduced. The first special matter of exception mentioned by *Rolle* to bastardize the issue, where the husband is within reach of access, is one of a natural impossibility; where the husband is within the age of puberty; though that was no obstacle to the marriage. There is a case in the year book 1 H. 6. 3. b. which goes the length of deciding the issue to be a bastard, where the husband was within the age of 14. There are several other cases mentioned from the year books, of course less questionable, as the age in those cases was much less. All these establish this principle, that where the husband in the course of *nature could not* have been the father of his wife's child, the child was by law a bastard. But *Foxcroft's case*, (a) p. 359, of the same book, which I before mentioned, was the case of an infirm bedridden man, who having married in that state 12 weeks before the delivery of his wife, that was holden to bastardize the issue, though the parties were together. And no doubt is thrown on the principle of that case in any subsequent authority, nor even in the learned editor's notes on Co. Lit. 244. a. 123. b. &c. This therefore is another instance of an exception to the general rule, admitted at so early a period as the 10 Ed. 1, and founded on natural impossibility arising from bodily infirmity. There is another case in the 18 Ed. 1, also mentioned in Rol. Abr. (p. 356,) still stronger to the present purpose; where the child was found to be born 11 days *post ultimum tempus legitimum mulieribus parienti constitutum*; and because of that fact, *et quia per veredictum juratorum*

(1) Vide *The King v. The Inhabitants of Kea*, 11 East, 132.

(a) Vide *ante*, 200 note (a).

invenitur quod prædictus Robertus (the husband), non habuit accessum ad prædictam Beatricem per unam mensem ante mortem suam, per quod magis presumitur contra prædictum Henricum (the issue,) &c. therefore the brother and heir of *Robert* had judgment to recover in assize. Even at that time, therefore, it was considered that the fact of access or non-access was a material question to be gone into; and that the period of time which had elapsed between the non-access and the birth, which only goes to establish the natural impossibility of the husband being the father of the child, was proper to be inquired of. And Lord C. J. *Rolle* adds a note to that case, that the jury found that the husband *languished of a fever long before his death*: which shews that the natural impediment to any access, arising from his languishing of a fever some time before his death, was also considered as an ingredient in the question which was submitted to the jury. The rule of law which has prevailed in these cases is, Bracton, p. 6. a., "*Stabitur huic presumptioni donec probetur in contrarium. Ut ecce, maritus probatur non concubuisse aliquandiu cum uxore, infirmitate vel alia causa impeditus, vel erat in ea invaliditudine ut generare non possit.*" From all these authorities I think this conclusion may be drawn, that circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded. And therefore, if we may resort to all to such impediments arising from the natural causes adverted to, we may adopt other causes equally potent and conducive to shew the absolute physical impossibility of the husband's being the father: I will not say the improbability of his being such; for upon the ground of improbability, however strong, I should not venture to proceed. No person, however, can raise a question, whether a fortnight's access of the husband, before the birth of a full grown child, can constitute in the course of nature the actual relation of father and child. But it is said, that if we break through the rule insisted upon, that the non-access of the husband must continue the whole period between the possible conception and delivery, we shall be driven to nice questions. That, however, is not so; for the general presumption will prevail, except a case of plain natural impossibility is shewn; and to establish as an exception a case of such extreme impossibility as the present cannot do any harm, or produce any uncertainty in the law on this subject. As to the case of *Regina v. Murray*, relied on for the position contended for; on which case alone *The King v. Albertson* proceeded; the ground of it was discountenanced by Mr. Justice *Lee* in *The King v. Reading*. Without weakening, therefore, any established cases, or any legal presumption, applicable to the subject, we may without hesitation say, that a child born under these circumstances is a bastard. With respect to the case where the parents have married so recently before the birth of the child that it could not have been begotten in wedlock, it stands upon its own peculiar ground. The marriage of the parties is the criterion adopted by the law, in cases of ante-nuptial generation, for ascertaining the actual parentage of the child. For this purpose it will not examine when the gestation began, looking only to the recognition of it by the husband in the subsequent act of marriage.

GROSE, J. As to the 1st and 2d objections which have been made, I shall content myself with referring to the answers given to them by my Lord. But in respect to the 3d objection, as we have been warned not to break in upon the common law, without some rule to go by, I shall make a few observations upon it. It is said, that if we break in upon the old rule of the *quatuor maria*, we must adopt some other line, which will be difficult to be drawn. But that rule has been long exploded on account of its absolute nonsense: and we will adopt another line, which has been marked out on account of its good sense. In every case we will take care, before we bastardize the issue of a

married woman, that it shall be proved that there was no such access as could enable the husband to be the father of the child. If by reason of imbecility, or on any personal account, or from absence from the place where the wife was, the husband could not be the father of the child, there is no reason why it should not be so declared. Here it is apparent that the husband, who had no access to the wife till two weeks before her delivery, could not be the father. And in saying so we go upon the sure ground of natural impossibility and good sense: rejecting a rule founded in nonsense.

LAWRENCE, J. The objections are reduced to two. The first is, that this order is made upon the evidence of a married woman, that her husband had no access to her: And *The King v. Reading*, and *The King v. Rooke*, have been relied on. But those cases are not broken in upon by sustaining the present order; because it was made on other evidence besides that of the wife. It is stated to have been made on examination of the wife on oath, *as otherwise*; by which I understand on other legal proof besides her evidence. But it is said, that we can make no intendment in support of this, which is more in the nature of a conviction for an offence than of an order. That however is not so, and is contrary to the determination in *The King v. Bedall*; between which and the present case there is no distinction, except that there the order was stated to be made "upon examination of the wife, *and other proof upon oath*;" the only question therefore is, whether the words "*as otherwise*," here used, must not be taken to mean *other proof upon oath*; for, if they can, the cases are parallel. Though if orders can be made in any cases without oath, which I do not know that they can, still this would be good as an order. But suppose it had been stated in express terms, that the wife had given evidence of the no-access, and that the same fact had been proved by ten other witnesses, we should presume in the case of an order that the magistrates had proceeded upon the evidence of the other witnesses as to that fact. This case comes to us after an appeal to the sessions; and we may presume that if there had been no other evidence of non-access than that of the wife, the sessions would not have confirmed the order. Then the 3d question is, whether, as the husband had no access until about a fortnight before the birth, a child so born can be said by our law to be legitimate. Now, without going over the whole ground of the argument again, the doctrine of the *quatuor maria* has been long exploded; and it has been shewn by the authorities mentioned by my lord, that imbecility from age, and natural infirmity from other causes, have always been deemed sufficient to bastardize the issue; all which evidence proceeds upon the ground of a natural impossibility that the husband should be the father of the child. Then why not give effect to any other matter which proves the same natural impossibility? It is said, however, that in so doing we shall shake a settled rule of law, that if a child be born in wedlock, though but a week after the marriage of its parents, such child is to be deemed legitimate. But I do not see that the consequence supposed would follow. By the civil law, if the parents married any time before the birth of the child, it was legitimate: and our law so far adopts the same rule, that if a man marry a woman who is with child, it raises a presumption that it is his own. Lord Rolle gives some such reason for the rule; and it seems to be founded in good sense; for where a man marries a woman whom he knows to be in this situation, he may be considered as acknowledging by a most solemn act that the child is his.

LE BLANC, J. As to the first objection, I think it must be taken that the wife was examined to prove the fact of the non-access of her husband within the time mentioned, as well as the other witnesses; for the particular facts proved by her and other witnesses, or by her alone, are given in detached sentences. And then the question is brought to this, whether an order of filiation, where the wife and other witnesses were examined to prove the non-access of the husband, can be supported? To that the case of *The King v.*

Bedall is in point; for there the wife, as well as other witnesses, was examined to prove that fact, (which I think appears as plainly here from the statement of the case), and yet the order was holden to be good. I consider that case, therefore, as an authority to this point. And it is more peculiarly fit to make the intendment, that the fact was proved by the other witnesses as well as by the wife, in a case like the present, where an appeal lies to the sessions from the original order of the justices; where the appeal has been heard; and where the objection might have been taken on the evidence, that no other than the wife had proved the non-access; and where notwithstanding it is stated that that fact, amongst others, was proved by the wife *as otherwise*; understanding, as I do, these latter words to mean other competent proof. The second objection has been properly abandoned; because it comes in effect to this question, whether a child proved to be a bastard be not the same, for the purpose of these acts of parliament, as a child *born out of matrimony*, or born of a *single woman*? To be sure they must be considered as the same thing. As to the 3d objection, the question will be, whether the child of a woman, whose husband is proved to have had no access to her till a fortnight before her delivery, can in law be considered as illegitimate? And our attention has been called to cases where a child born within a short time after the marriage of the parents is, by the rule of law, considered to be legitimate. That is a rule of law not to be broken in upon, except as in other cases, one of which has been mentioned, by proof of natural imbecility, which shewed that the husband could not have been the father of the child. But in order to make the cases the same, it must be supposed that the adultery of the wife in the absence of her husband, who only returns to her just before her delivery, is assimilated to law to the case of a man's marriage with a pregnant woman recently before the birth of the child, where the very act of marriage in such a situation is an acknowledgment by him that he is the father of the child with which the woman is pregnant. But there is no analogy between the two cases. It comes then to a case of non-access for a year and a half, excepting the last 14 days before delivery. The rule of law was formerly very strict in favour of the legitimacy of children born of a married woman whose husband was within the four seas; but that has been long broken in upon. Afterwards the rule was brought to this, that where there was an impossibility that the husband could have had access to his wife, and have been the father of the child, there it should be deemed illegitimate: And in *Goodright v. Saul*, 4 Term Rep. 356, the Court held that there was no necessity to prove the impossibility of access, if the other circumstances of the case went strongly to rebut the presumption of access. The cases of *The Queen v. Murray*, and *The King v. Albertson*, were rather cited for the sake of expressions thrown out by some of the judges in giving their opinions, than for the determination of the Court: for the points in judgment did not require the support of the doctrine advanced, that there must be non-access during the whole period of the wife's pregnancy in order to bastardize the issue. But where it can be demonstrated to be absolutely impossible, in the course of nature, that the husband could be the father of the child, it does not break in upon the reason of the current of authorities, to say that the issue is illegitimate. If it do not appear but what he might have been the father, the presumption of law still holds in favour of the legitimacy. But if, as in this case, it be proved to be impossible that he should have been the father, then, within the principle of the modern cases, there is nothing to prevent us from coming to that conclusion.

Order confirmed.(1)

(1) [See 2 Stark. Ev. (7th Amer. ed.) p. 196 & seq., where all the cases are collected upon the point of the bastardy of a child born during the wedlock of his mother—and particularly notes 1 & B. on p. 196, where the American cases are referred to. The doctrine there laid down is fully in accordance with the decision in the text. In Pennsylv-

The King v. The Archbishop of Canterbury.

8 East, 213. Jan. 31, 1807.

No *mandamus* lies to the Archbishop of *Canterbury* to issue his *fiat* to the proper officer, &c. for the admission of, a Doctor of Civil Law, graduated at *Cambridge*, as an Advocate of the Court of Arches.

WILSON, in the last term, applied for a writ of *mandamus* to the Archbishop, to issue his *fiat* to the vicar general of the province of *Canterbury*, for the purpose of making out a rescript under the seal of the vicar general, commanding the dean of the arches to admit Dr. *Highmore* as an advocate of the Court of Arches. This application was founded on affidavits stating in substance, that the Court of Arches, the Court of Peculiars, the Prerogative Court, and other ancient courts, are governed by the civil and canon law, under the jurisdiction and control of the Archbishop of *Canterbury*; that the advocates of those Courts also practice in the Court of Admiralty; and that no doctor of the civil law is admitted to practice in the latter who has not been previously admitted an advocate of the Court of arches by the rescript of the Archbishop. That the mode of obtaining such admission is for the candidate to deliver his certificate of qualification, viz. of his degree of doctor of civil law, signed by the registrar of the university where taken, into the office of the vicar general of the province of *Canterbury*; where a petition is made out, praying that the candidate may, in consideration of that qualification, be admitted an advocate; which petition being signed by the candidate, is forwarded from that office to the Archbishop, who returns upon the same instrument his *fiat*, ordering the commission or rescript to be made out as prayed for: which, without such *fiat*, cannot be obtained. The petition and *fiat* are then returned to the vicar general; and the rescript, which orders the dean of the arches to admit the candidate as an advocate, is then made out under the seal of the vicar general, and delivered to the registrar of the province. The candidate is afterwards introduced into court by two advocates, and presented to the dean of arches, who after the Archbishop's rescript is read, and the candidate has taken the oaths, admits him as an advocate of the court; declaring such admissions to be in pursuance of the Archbishop's rescript. The candidate is afterwards admitted in a similar manner in the Court of Admiralty. It was then stated that Dr. *Highmore* took deacon's orders in the church in 1790, but laid aside the clerical character in 1793, having never taken priests' orders; and then studied the canon and civil law; and in 1796, obtained the degree of doctor of civil law, as a regular graduate in the university of *Cambridge*, and has expended a large sum in the prosecution of these studies. That this degree is conferred by the universities indiscriminately on the clergy and laity. That the privileges of the two universities, and amongst others of the doctors and students of civil law, are secured by divers statutes, charters, and patents. That the principal advantage of the degree of doctor of civil law is the obtaining the privilege of practising in the said courts, and that such was Dr. *Highmore's* object in taking his degree. That it has been the constant practice for the Archbishop for the time being to grant his *fiat* upon the petition and certificate before-mentioned; and that the advocates now practising in the said courts are doctors of the civil law. It then appeared, that about *March* 1805, Dr. *Highmore* sent in to the Archbishop the certificate of his degree and qualification, signed by the registrar of the university of *Cambridge* with a petition for the Archbishop's *fiat* in the usual form; not noticing, because it was not believed to be material, the cir-

vania it has been held, that upon an indictment for fornication and bastardy, a married woman is a competent witness to prove the criminal connection with her, but not the non-access of the husband. *Commonwealth v. Shepherd*, 6 Binn. 283.—W.]

cumstance of his having been in deacon's orders. On this the Archbishop returned his *fiat*; and the rescript thereon being formerly executed and sealed in the office of the deputy registrar of the province; Dr. *Highmore*, on the 27th of *April*, acquainted the dean of arches therewith; who informed him, that having been in deacon's orders, he could not be admitted as an advocate of that court, the same being forbidden by the canons of the church. On reference afterwards to the Archbishop, the latter declined deciding on the matter, and referred the defendant to the Judge of the Admiralty for his opinion, who coincided with the dean of the arches. And on the 14th of *May* 1805, Dr. *Highmore* was informed by letter from the Archbishop, that he had received an answer from Sir *Wm. Wynne* (dean of the arches,) and Sir *Wm. Scott* (judge of the admiralty,) respecting Dr. *Highmore's* application, and that they were decidedly of opinion that he could not be admitted as an advocate in Doctors' Commons. In consequence of this, as it afterwards appeared, the Archbishop withdrew his *fiat*, and caused it to be cancelled. The affidavits further stated, that the judges and advocates of the Ecclesiastical and Admiralty Courts were incorporated by charter in 1768, under the name of the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts; and it was thereby appointed that the society should consist of a president who should be the dean of the arches, and of such doctors of law as should be judges in those courts, or admitted to practise therein as advocates by the rescript of the Archbishop of *Canterbury*; and that no one should be qualified to be admitted who had not regularly taken the degree of doctor of laws at *Oxford* or *Cambridge*, and been admitted an advocate of the Court of Arches: with a proviso saving the rights of the king's courts. And it is also provided in case of abuses or differences in the government of the society, that the Archbishop of *Canterbury*, the Lord Chancellor, the Lord Privy Seal, and the two Secretaries of State, should be visitors, with power to redress and compose them. That Dr. *Highmore*, on the 26th of *September* 1805, appealed to the visitors against the refusal of the society to admit him as a member; the *fiat* of the Archbishop being at that time in the registrar's office: but on the 2d of *April* 1806, he received official notification from the Archbishop's Secretary, that as the Archbishop's *fiat* had never been presented to the Dean of the Arches, and had been withdrawn and cancelled, in consequence of information to the Archbishop that Dr. *Highmore* was in deacon's orders, of which his Grace was not apprised when the *fiat* was granted, there was no act done by the College of Doctors of Laws upon which the jurisdiction of the visitors could attach. Dr. *Highmore* again applied for admission on the 30th of *June* last, on the ground of his commission having been once granted, and was again refused by the Dean of Arches, and by the Judge of the Admiralty, in their respective courts. After which he applied to the Archbishop for a renewal of his *fiat*, which the latter declined. Dr. *Highmore* also stated upon his information and belief, that it would appear upon inspection of the register of the society of Advocates, that divers persons in holy orders, both before and after the formal promulgation of the canons in the reign of *James I.*, had been admitted to practice as advocates in those courts.

The Court, when this matter was first moved at the end of last term, objected to granting a rule to shew cause, for want of the relator's shewing an inchoate right to be admitted an advocate of the court: but gave him leave to move the matter again in this term, if he should be so advised. Accordingly

Wilson now renewed his application for the mandamus; and, in answer to what he considered to be the principal grounds of objection, contended, 1st, that this Court had jurisdiction to interfere in the matter of a spiritual officer, notwithstanding what was said by Lord *Holt* in *Rex v. Ozenden*,^(a) where a

(a) 3 Show. 217. 251. 261. 3 Mod. 332. Carth. 170. 3 Salk. 230.

mandamus was refused to restore a proctor, on the ground that the king had two distinct jurisdictions; the one ecclesiastical, the other temporal: and that he did not exercise the former in this court. For there are many instances in the books of this Court interfering in matters relating to ecclesiastical officers; as *Hurst's* case, (a) where a *mandamus* went to restore one to an attorney's place in the Court of *Canterbury*: and where mention was also made of a similar precedent, of a *mandamus* to restore an attorney of the Court of the Liberty of *St. Martin's Le Grand, London*. The writ has also been granted at the instance of a deputy registrar; (b) a schoolmaster; (c) an apparitor-general; (d) a sexton; (e) a parish clerk; (f) and churchwardens; (g) all of whom are spiritual officers. There is, therefore, no objection on this ground. 2dly, This is an officer of a public nature. It confers a peculiar privilege to conduct the causes; and the public have an interest in the free admission of those who have qualified themselves in the accustomed manner to exercise the function of advocates. The courts in which the doctors of laws claim to practise exclusively have cognizance of all matters of wills, and marriages, of prizes, and all other matters of which the Admiralty has jurisdiction. If the Archbishop have a general power to deny admission, without assigning any reason, he would in effect have the power of appointing his own advocates, which would give him an undue controul over them. He might refuse so many that the number practising might be reduced so low as to cause inconvenience to the public, or even until none were left.

There is not, it is true, any instance of a *mandamus* to admit or to restore an advocate; but if it may be done in the case of an attorney, *a fortiori* in that of an advocate. [The Court intimated that the *mandamus* in those cases was probably to admit the attorney to practise in some common law court, such as the Court of *St Martin Le Grand*, one of the instances mentioned.] It is contrary to the genius of the constitution to vest an absolute discretion in any person without controul: but if this Court will not interfere in this case, the Archbishop will have unlimited authority to reject whom he pleases, after all the expence and study of an individual to qualify himself for his profession. If the Societies of the Inns of Court reject a candidate for admission to the Bar, an appeal lies to all the Judges; and the refusal of a *mandamus* in such case was groundless on the existence of such domestic forum of appeal. But here is no other remedy if the Court will not interfere; for Dr. *Highmore's* appeal was refused to be heard, because he was not a member of the corporation. The only reason suggested by the Archbishop for withholding his fiat was, that Dr. *Highmore* had taken Deacon's orders; but there are many instances of persons so circumstanced having been admitted advocates; and the stat. 21 H. 8. c. 13. s. 28, supposes that advocates may be spiritual persons; and also shews that they are officers; for it speaks of their *offices*.

(a) 1 Lev. 75. But this appears, by the report of the same case in Sir T. Ray. 56. 94, to be meant of the town Court of *Canterbury*.

(b) *Rex v. Ward*, 2 Stra. 893. Vide 5 Bac. Abr. (G), 198, in *margin*. The right to the office of registrar is to be determined at common law, and not to be tried in the spiritual court; though the subject-matter be spiritual; because the office itself, being *matter of freehold*, is for that reason of *temporal* cognizance. 2 Roll. Abr. 285. 4 Mod. 27, 8. Carth. 169.

(c) *Rex v. The Bailiffs of Morpeth*, 1 Stra. 58. Vide Cox's case, 1 P. Wms. 29, where it is considered how far the keeping of a school is of ecclesiastical cognizance; et Q.

(d) *Foulke's* case, cited 1 Stra. 897.

(e) *Ile's* case, 1 Ventr. 143, and *Olive v. Ingram*, 2 Stra. 1114. Vide 3 Burn. Eccl. Law, 319, title *Sexton*.

(f) Cited *ib.* and *Davis's* case, Hil. 4 G. 1, cited in 2 Stra. 897. "But though the execution of the office concerneth Divine Service, yet the office itself is merely temporal," 13 Rep. 70.

(g) The case of the parish of *St. Balounee in Kent*, and *Morgan v. The Archdeacon of Cardigan*, 1 Salk. 166. But a churchwarden is a *temporal* officer, *ib.* and vide 4 Vin. Abr. 525. pl. 4, in *margin*.

Lord ELLENBOROUGH, C. J. There ought in all cases to be a specific legal right, as well as the want of a specific legal remedy, in order to found an application for a *mandamus*. But here nothing appears to shew, that Dr. *Highmore* has any legal right to what he claims, more than any other of his majesty's subjects: therefore, however sorry we may feel for the disappointment of the individual who has consumed his time and substance in a fruitless pursuit, we cannot interfere.

Dr. *Highmore* himself, who was present in court, then pressed, as reasons for having a rule to shew cause, the hardship of his case, and that this was the only course open to him for having the question of his eligibility discussed. But

Lord ELLENBOROUGH, C. J. said, in answer to him, that the Court, since the last term, when this matter was first moved, had considered the question very maturely: and were fully satisfied that it would be to no purpose to grant a rule nisi as they must necessarily come to the same conclusion; having no authority to administer a legal remedy except to enforce a legal right.(1)(2)
Rule refused.

The Case of Kirkby Ravensworth Hospital.

8 East, 221. Feb. 3, 1807.

Where the founder of a hospital directed, that if, in making up the accounts of the wardens biennially going out of office, any doubt should arise which could not be decided by the new wardens, &c. the ordinary should decide it; and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct or remove the master for certain causes; and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of *interpreting the statutes* in case of any doubt; and the founder also delegated to the dean and chapter of *York*, power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity; held that none of the powers so delegated constituted a visitor, so as to exclude the application of the powers granted by the stat. 43 Eliz. c. 4; and consequently, that a commission of charitable uses issued out of the Court of Chancery under that act was valid.

BY an order of the Lord Chancellor, made upon a motion to quash a commission of charitable uses, as having improperly issued in a case not warranted by the statute, the following case was stated for the opinion of this Court. By letters patent under the great seal, in the 2 & 3 Philip & Mary, licence was given to Dr. *John Dakyn*, Rector of *Kirkby Ravensworth* parish, in the county of *York*, to found in that parish a school or alma-house, or hospital, for the education of boys, and for the relief of the poor; to consist of two wardens and one master of the scholars, and certain other poor persons, according to the statutes, ordinances, and foundation to be made by the said *John Dakyn*, his heirs or assigns. It was also granted, that Dr. *Dakyn*, his heirs, executors, and assigns, or any of them, should, from time to time, make ordinances, statutes, and rules for the government of the said scholars and wardens, boys, and infirm people of the hospital: and that the two wardens and master, and their successors, should be a corporation, and have perpetual succession, by the name of "Wardens, Teacher or Master of the Scholars and Poor People of the Almshouse or Hospital of *St. John the Baptist*, of *Kirkby Ravensworth*," and should be capable of taking lands, &c. Dr. *Dakyn*, by

(1) Vide *The Commonwealth v. Rossiter & al.* 2 Binn. 360.

(2) [A *mandamus* does not lie to the Judges of the Common Pleas to compel them to admit an Attorney. The admission of an Attorney is a judicial and not a ministerial act, and therefore not the subject of a writ of *mandamus*. *Commonwealth v. Judges of the Com. Pleas*, 1 S. & R. 187.—W.]

virtue of this licence, in 1556 established the school or hospital, and endowed it with lands, &c.; and also made rules, ordinances, and statutes for the government of the charity, dated the 11th of *May* 1556; whereby, after appointing a mode of electing the wardens biennially, by ballot, at a meeting of the rector, vicar, or curate of *Kirkby Ravensworth*, and specifying the duties of the wardens; it is provided by cap. 5, that both the wardens, after their accompt of their receipts and expences, according to the form prescribed in their oath, (at the giving in of which accounts no parishioner of *Kirkby Ravensworth* is to be excluded) shall receive 10s. for each year of their office by the hands of the new wardens, besides their necessary expences. But if in making up the accounts any doubt or any other thing hurtful to the said alms-house or hospital shall arise, which cannot be decided and ended by the care and discretion of the two wardens, rector, vicar or curate, and schoolmaster, then the new wardens shall, within 40 days next ensuing, lay this matter before the *ordinary of the place*, and shall take care that the old wardens shall answer before the said ordinary concerning their doings, juxta formulam ecclesiæ, quia contingit de religione domi. By cap. 6, after appointing the election of schoolmaster by the two wardens and the rector, vicar, or curate, and two churchwardens of the parish, or the major part of them, it is provided that if they neglect to substitute a master within 60 days after the death, privation, or promotion of the former master, then the substitution of the said master (if made within 30 days after notice to them) shall pertain to *the dean and chapter of York*; and if they omit, &c. the appointment, for that turn only, shall devolve to *the Bishop of Chester*, or if the see be vacant, to the dean and chapter. By cap. 11, if the master be addicted to gaming or drinking, or be disgraced, or defamed by any other crime that shall stand in need of ecclesiastical correction, this shall be punished by *the ordinary of the place*, according to the rules and canons of the ecclesiastical law; by whom also, if the crime require it, he shall be removed from his office. By chap. 31, after ordaining that 5l. for the use of the alms-house be constantly kept in a chest in the parish church, and lent only upon good security, for re-payment within six months, it is provided that if the money be taken out by rapine, &c. the wardens and schoolmaster shall so long be deprived of their salaries by *the ordinary of the place*, till the money be restored; and in such a case, there shall be a power in *the ordinary* to sequester the profits, and make inquiry concerning the premises, when he pleases. Cap. 35. Also I will, ordain, and appoint, that if any doubt shall arise concerning the meaning of the statutes already published, or shall hereafter be set forth by me, or any thereto lawfully authorized; that doubt, of whatsoever nature, shall be interpreted, altered, or made new by me *John Dakyn*, if I please to have it so, while I live: but if any doubt shall happen when I am dead, I will that it be determined and interpreted by *the ordinary of the place*, with as much regard to the grammatical sense as may be. Cap. 36. Also if it should happen at any time hereafter that the wardens, schoolmaster, or poor people of the alms-house or hospital, or any of them, shall sell, mortgage, or any other way alienate any of the lands, &c. pertaining to it, otherwise than by leasing the same for years, for the value of the wonted rent at least, or shall permit any of the lands or other premises to be unjustly usurped, &c. and shall not resist the usurpers, &c. to the utmost of their power; and if after such an attempt, the master, wardens, and poor people do not bring an action at law against the usurpers within half a year, and effectually prosecute it; in such a case, I will, ordain, and appoint that *the dean and chapter of York* shall have power and authority to expel and remove, as they like, the two wardens and schoolmaster, or any of them, alienating or consenting to the alienation of the premises, &c. and to appoint others, &c. who will claim and regain the lands usurped, &c. and apply and restore the same to the said alms-house or hospital, and reform the neglects, &c. and preserve the said alms-house

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Interpret the statutes constitutes a visitor; for in both there was an express power given to visit, and to correct and punish. The statute of Elizabeth, c. 4, looked particularly to correct abuses which had been committed of lands given to charitable uses. Here there is no general correct such abuses, but a special power only, which excludes the founder had meant that the ordinary should have general powers, he would not have given him a special power in the case properly withdrawn from the chest. It has been holden that a visitor may expel; but a power to interpret statutes cannot in itself justify expulsion or appointment. And in construing the statute, nothing is to be taken away from him or his heirs, unless by plain words or necessary implication. If the visitor had been appointed, or even a general power of controul over the lands, &c. of the charity, no commission could issue under the Great Seal of Elizabeth: but the power is only given to the dean and chapter in the particular cases of mortgage or alienation by the wardens, &c. and to have the immediate management: there is no provision made against abuses of a different description, or by the dean and chapter themselves.

The following certificate was afterwards sent to the Lord Chancellor:

We have heard this case argued, have considered it, and are of opinion, that there is not any visitor, governor or overseer, or visitors, governors, or overseers of the said hospital appointed, within the intent and meaning of the act of parliament made in the 43d of Elizabeth, c. 4, above referred to; so as to exclude the application of the powers granted by that act.

12th Feb. 1807.

ELLENBOROUGH,
 N. GROSE,
 S. LAWRENCE,
 S. LE BLANC.

Doe, on the Demise of the Earl of Carlisle, v. Woodman and Forster.

8 East, 226. Feb. 4, 1807.

An ejectment against the bailiff's *pro tempore* of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate, such tenancy may be determined by a notice to the corporation to quit, served on its officers; after which the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises.

THE Earl of Carlisle brought this ejectment to recover certain pasture lands in *Morpeth* and *Milford*, in the county of *Northumberland*, which had for many years before been demised by him to the corporation of *Morpeth* as tenants from year to year, at an annual rent. And at the trial before *Graham, B.* at *Newcastle*, proof was given of a notice to quit on the 12th of *May* 1806, which was served on the 7th of *October* preceding upon the defendants, who were the two bailiffs or head officers of the corporation. It also appeared that the two bailiffs were annually elected on the first *Monday* after *Michaelmas*; that the rent which was due on the 12th of *May* had constantly been received from "the bailiffs;" for the time being, and was so expressed to be in the steward's receipts given to them; that cattle had been used to be turned upon the lands in question, but to whom belonging did not appear; (though it was now suggested that the privilege of turning on cattle had been enjoyed by such of the corporators at large as chose to avail themselves of it:) and that the

present bailiffs, the defendants had been chosen recently before they were served with the notice to quit, and had not hitherto paid any rent. Thereupon the defendant's counsel pressed for a nonsuit; insisting that the ejectment ought to have been brought against the corporation, who were the lessees, and not against the bailiffs, who were the mere stewards of the corporation, and as such had paid rent; and that there was no evidence of possession by these defendants in their individual capacity. In answer to which it was contended, that the ejectment proceeded on the ground that the corporation were the tenants of Lord *Carlisle*, but that they occupied the land by the bailiffs, as their principal officers. That the corporate body could not be made defendants, not being in the actual occupation of the land; and that the receipts for rent were evidence that the bailiffs *virtute officii* had the actual possession. And the learned Judge, inclining to the latter opinion, suffered a verdict to be taken for the plaintiff, with leave to the defendants to move to enter a nonsuit. A rule *nisi* was accordingly obtained for this purpose in the last term; against which

Park, *Wood*, and *Carr*, now shewed cause; and rested principally on the difficulties which the lessor of the plaintiff had to encounter in this case; inasmuch as the corporation, *qua* corporation, could not have an actual possession, nor commit trespass,^(a) and having no visible being, could not be served with a notice to quit: it would be impossible to serve every individual corporator. Their occupation could only be by their officers or tenants, and these only could be served with notice to quit, as had been done in the present case: and the receipts shewed that the bailiffs *pro tempore* were the actual occupiers in regular succession, one set after another. Besides, the bailiffs, by coming in to defend, admit themselves to be in possession as tenants.

Cockell, Serjt. *Holroyd*, and *Richardson*, contra, were stopped by the Court.

LORD ELLENBOROUGH, C. J. The bailiffs, *as such*, not being a distinct corporation, cannot have the possession; whatever they enjoy as bailiffs, must be in right of the corporation at large. There is no evidence at all to affect these defendants: for the bailiffs are no corporation of themselves, and therefore can have no succession; and consequently cannot, as bailiffs, be affected by the receipts for rent given to their predecessors. There is no privity in law between them.

LAWRENCE, J. Though trespass cannot be maintained against a corporation as such; yet the lessor is not without remedy: for, at any rate, the tenancy may be determined by notice to the corporation, served on its officers. And if after determination the cattle of any person be found upon the premises they may be distrained as trespassing upon the Earl of *Carlisle's* ground: or Lord *Carlisle* might have turned his own cattle in: ^(b) or ejectment might be brought against any person being tenant in possession under the corporation.

LE BLANC, J. These defendants have never paid any rent for this ground; and not being a corporation in themselves, they cannot be affected by what former bailiffs have done; though it is rather evidence that they paid the rent on behalf of the corporation. And when the tenancy is determined the lessor will have his remedy against any person in possession, or whose cattle shall be found trespassing on his land.

LORD ELLENBOROUGH, C. J. added, that there was no great difficulty in the lessor's asserting his right; but at any rate, he had mistaken his way in adopting this mode of doing it.

GROSE, J. absent.

Rule absolute.

(a) Bro. Corporation, pl. 43. Sed vide Com. Dig. Franchise, F. 19, and Th. Dig. lib. 4, c. 13. s. 2. 4. 7, and *Hil.* 45 Ed. 3. 2. *M.* 8 H. 6. 1. *M.* 9 H. 6. 36. *M.* 20 H. 6. 9. *M.* 15 Ed. 4. 2. *T.* 4 H. 7. 13, and *M.* 32 H. 6. 10.

(b) Vide *Taunton v. Foster*, 7 Term Rep. 431.

Sir Roger Kerrison, Knt. v. Cole and Others, Executors, &c. of John Mann.

8 East, 231. Feb. 6, 1807.

Though a bill of *sale* for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by st. 26 Geo. 3. c. 60. s. 17, yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the re-payment of the money.

THE plaintiff declared in covenant upon an indenture, made the 31st of May 1793, between himself and the testator, whereby a consideration of 2500*l.* advanced by the plaintiff to the testator, and for securing the repayment of it, the testator bargained and sold to the plaintiff the ship *Triton*, of *Yarmouth*, then trading to *Newcastle*; the ship *Hope* of *Ely*, then trading to *Dantzick*; the ship *Albicore* of *London*, then trading to *London*; the sloop *Squirrel* of *London*, then trading to *London*; a moiety of the brig *Friends*, of *London*, (describing all these vessels by their tonnage, &c.); and also three certain lighters, (describing them,) with a proviso for the indenture to be void upon payment by the testator, his executors, &c. of 2500*l.* to the plaintiff on the 31st of August ensuing the date. The indenture also contained an express covenant by the testator, for himself, his executors, &c. to pay to the plaintiff the said 2500*l.* with interest, &c. The declaration concluded with alleging a breach by non-payment of the money. The plea, after cravingoyer of the indenture, which was set forth in substance as in the declaration stated; with covenants for the title of the testator, and for the quiet enjoyment of the plaintiff, and for further assurance; pleaded that the plaintiff and the testator, at the time of making the indenture, were subjects of the king, and that the ships and lighters mentioned had been registered pursuant to the stat. 26 Geo. 3. c. 60, and that certificates of registry of each of them had been granted pursuant to the act. That the property of the said ships and lighters so intended to be transferred was then in the testator, and that the certificates of registry of the same were not recited in the said indenture, as required by the statute: wherefore, the said indenture was utterly null and void, to all intents and purposes. To this there was a general demurrer, and joinder.

Manley, in support of the demurrer, contended that the defendants were liable upon the covenant of their testator for the repayment of the money, although the security were void, as to the vessels intended to be mortgaged, for the defect pointed out. For the stat. 26 G. 3. c. 60. s. 17, on which the objection arises, only avoids the instrument, *qua* bill of sale, and not the collateral personal covenant of the party. The 3d section directs every *British* ship to be registered, and a certificate thereof to be obtained. The 16th section provides that, in case of any alteration in the property of the ship, the same shall be indorsed upon the certificate of registry. And the 17th section requires, that upon any transfer of the property such certificate shall be recited "in the bill or other instrument of sale thereof; and that otherwise such "bill of sale shall be utterly null and void to all intents and purposes." The object of the act being to confine the privileges of *British* ships to *British* subjects will be effectually secured by avoiding the transfer for want of the proper requisites, without extending the avoidance to every collateral contract contained in the same instrument. As in *Mouys v. Leake*, 8 Term Rep. 411, where a rector, having granted an annuity out of his benefice, which was void by the stat. 13 Eliz. c. 20, was yet holden to be liable upon his personal covenant to pay it contained in the same deed; though the statute says, "that all chargings of benefices with any pension out of the same, &c. shall be utterly void." Lord Kenyon said, that a deed intended to operate in one way may operate another way, *ut res magis valeat quam pereat*, if honesty required it:

and that the deed, which was intended to operate as a rent charge upon the living, might have effect as a personal security against the grantor, containing as it did, a covenant to pay the annuity. And in *Mestaer v. Gillespie*, 11 Ves. 629, Lord Chancellor *Eldon* seemed inclined to adopt the same construction upon the registry act.

Wood, contra, insisted that the whole instrument was void, both by the policy and the words of the registry act. The words are that "the bill or other instrument of sale shall be utterly null and void to ALL intents and purposes," if the certificate of registry be not truly recited therein; not merely that the property shall not pass. But this is an attempt to make the instrument good to one intent and purpose, though void as to all others; which will counteract the object and policy of the law nearly as much as if it were valid to all intents. When the act says, that the instrument of sale shall be void, it is the same as if it said that every part and clause of it shall be void. The omission may be made with intent to evade the law, taking the chance of reverting to the personal security of the party, if the objection be made. At any rate, the parties who omit to do that which the policy of the law requires to be done for purposes of state, are *in delicto*, and ought not to be aided in any respect against the letter of the law. The stat. 34 Geo. 3. c. 68. s. 14, *in pari materia*, reciting the 17th section of the former act, and that doubts had arisen whether contracts for the transfer of such property might be made without any instrument in writing, provides that no such contract shall be valid for any purpose whatsoever, either in law or in equity, unless made by bill of sale or instrument in writing, containing the recital required by the former act: which shews that the Legislature meant to avoid the instrument itself in toto in case of omitting the requisite formalities. The bill of sale also contains several other covenants besides that for repayment of the money, which relate to the ships; and it will be difficult to sever the one from the other. [Lord *Ellenborough*, C. J. All dependant covenants must share the fate of the principal covenant, on which they depend.] They are all interwoven, and form one entire contract in one instrument. And no injustice will be done in the particular case; for the plaintiff may still sue as a simple contract creditor for the money lent. He admitted, that the case of *Mouys v. Leake*, which he was not before apprised of, bore strongly on the present: but questioned its consistency with the policy of the registry acts.

LORD ELLENBOROUGH, C. J. The case of *Mouys v. Leake* is founded on admirable good sense and sound law. This is an attempt to put a harsher construction on these acts than has ever yet been done; and cases sufficiently hard have already occurred; though altogether the acts are very beneficial to the public. This was an assignment, by way of mortgage, of certain ships, which by the direction of the acts must have certificates of registry; and in order to make the assignment effectual as sales of these ships, it is necessary that it should contain recitals of the certificates, according to the direction of the 17th section of the 26 Geo. 3. c. 60, which says, "that when the property in any ship belonging to any of his majesty's subjects shall be transferred to any other subject in whole or in part, the certificate, &c. shall be truly recited, &c. in the bill or other instrument of sale;" and this must be done on pain of vacating the security. But what security does it vacate? The bill of sale: the clause goes on, "otherwise such bill of sale shall be utterly null and void to all intents and purposes." It does not vacate the whole instrument which may happen also to contain any other independent contract between the parties; but that part of it only which operates as a bill of sale. Nor was it necessary to do more: and therefore the words of the stat. 34 Geo. 3. c. 60. s. 14, are, that no transfer, contract, or agreement for transfer of property in any ship shall be valid, unless it be in writing, containing the recital prescribed by the former act. And thus far it was necessary to go to give effect to the acts. But to go farther, and vacate the covenant

for payment of the money lent, would be going beyond the reason and object of the Legislature in order to work injustice. If we wanted any case to warrant this construction, it is supplied by that which has been cited: where the question arising upon the stat. 13 Eliz. c. 20, containing words of avoidance equally strong with the registry act; the Court held that it did not affect the personal covenant to pay the rent-charge, but only defeated the security of such rent-charge upon the living.

LAWRENCE, J.(a) The object of the act will be very sufficiently answered, if we hold it to make void so much only of the instrument as is meant to convey the property in the ships. The object of the Legislature was, that it should be made appear who were the real owners of *British* ships, in order to prevent any transfer of them to foreigners, who might navigate them under the privileges of the *British* flag. That will effectually be done by saying, that the transfer shall be void if the requisites be not complied with; without avoiding a collateral covenant for the payment of money contained in the same deed by which the ships were intended to be mortgaged. And this construction is according to the rule of the common law, as laid down by *Hutton, J.* in *Ley's Rep.* 79, that when a good thing and a void thing are put together in the same grant, the common law makes such a construction that the grant shall be good for that which is good, and void for that which is void.(1) There is indeed a distinction taken in *Hob. Rep.* 14, between an avoidance of an instrument by the common, or by the statute law; that if it be void in part by the statute law, it is void for the whole; but that the common law only avoids so much of it as is bad, leaving the rest which is good; which distinction is alluded to by Lord C. J. *Wilmot* in *Collins v. Blantern*, 2 Wils. 351. But these cases, when examined, are easily reconcilable; as in the case of sheriffs' bonds, which are only authorised to be taken with a certain condition; and therefore if they be taken with any other condition, they are void *in toto*, and cannot stand good in part only: but that does not apply to different and independent covenants in the same instrument, which may be good in part, and bad in part. The case therefore of *Mouys v. Leake* agrees with all the authorities, and governs the present case.

LE BLANC, J. Our opinion on the construction of the registry act is fully supported by the case cited: but even without that I should have had no doubt upon the subject. For the object of the act, which was to enforce a mere political regulation, is effectually attained by avoiding the transfer of the ships, for want of the requisites in the bill of sale: and there being nothing immoral in the transaction itself, there is no necessity for carrying the construction further. When, therefore, the act says, that for want of certain requisites such "bill of sale" shall be void, it means only that such *transfer of the property* shall be void.

Judgment for the plaintiff.

In the Matter of Samuel Lowe.

8 East, 237. Feb. 7, 1807.

The Court will not compel an attorney, upon a summary application, to deliver up on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in court, nor any criminal conduct imputed to him in respect of it.

COWLEY moved for a rule upon Mr. *Lowe*, an attorney of this Court, to shew cause why he should not deliver to *Williams* and others, members of a building society, a lease which they had put into his hands in order to pre-

(a) *Grose, J.* was absent from indisposition.

(1) Vide *Van Dyck v. Van Beuren & al.* 1 Johns. 362.

pare an assignment of it; having offered to pay him what he claimed for his bill. Upon a question put by the Court, Whether there were any cause in court, he admitted there was none; but cited *Hughes v. Mayre*, 3 Term Rep. 275, and *Strong v. Howe*, 1 Stra. 621, to shew that the Court, without any cause pending, would compel an attorney, by rule, to deliver up papers entrusted to his charge by his clients, upon paying what was due to him in his character of attorney.

The Court, however, referred to *Cocks v. Harman*, 6 East, 404, as having recently settled the point, that they would not interfere in this summary mode to compel an attorney to deliver up papers; which, if improperly detained, were the subject-matter of a bill in equity, or of an action; as the rule was laid down in *Goring v. Bishop*, Salk. 87. Here the deed was not put into *Lowe's* hands for the purpose of any cause in Court: nor was there any imputation against him of criminal conduct in his character of attorney. And they distinguished this from the case of *Hughes v. Mayre*, where the principal object of the application was to compel the attorney to deliver up the Court Rolls of a manor, of which he acted as steward, of the lord.

Rule refused.

Dunster v. Day and Smith.

8 East, 239. Feb. 7, 1807.

The London Court of Requests act 39 and 40 G. 3. c. 104. s. 12, provides that if any action be commenced out of that court for any debt not exceeding 5*l.* (within the jurisdiction) the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to costs, &c. Held that after judgment by default and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs.

AFTER judgment by default, and a writ of inquiry executed, and damages assessed at 4*l.* 7*s.* 6*d.*, the defendant *Day*, before final judgment, obtained a rule nisi for entering a suggestion on the roll that the defendants resided, &c. at the time of the commencement of this action, within the jurisdiction of the London Court of Requests, (under stat. 39 & 40 Geo. 3. c. 104, (a) giving jurisdiction to the extent of 5*l.*;) and why upon payment of 4*l.* 7*s.* 6*d.*, the damages assessed upon the writ of inquiry, &c. without costs, the proceedings should not be stayed.

Wigley objected, on shewing cause, that the application was too late after interlocutory judgment; and cited *Brampton v. Crabb*, 1 Stra. 46, where a similar motion upon the stat. 3 J. 1. c. 15, for regulating the same court, was denied; because the defendant, having made default, was out of court to all purposes but having judgment against him, and therefore could not be received to make the suggestion. And here, the verdict spoken of in the 12th section of the late act means a verdict obtained before a Judge, as appears by the latter part of the clause.

Barrow, in support of the rule, said that the case cited had been since overruled in *Barney v. Tubb*, 2 H. Blac. 356.

LORD ELLENBOROUGH, C. J. The 12th section of the stat. 39 & 40 Geo. 3, says, that if the action be commenced out of the Court of Requests for any debt not exceeding 5*l.*, the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to costs; which must include the present case.

(a) The 12th section enacts, "that if any action shall be commenced in any other court than the said Court of Requests for any debt not exceeding 5*l.* &c. the plaintiff shall not, by reason of a verdict for him, or otherwise, have or be entitled to any costs whatsoever. And if the verdict shall be given for the defendant, and the Judge, before whom the action shall be tried, shall certify, &c. then the defendant shall have double costs," &c.

And there is nothing to prevent the defendant, when he is out of court, from coming here, on motion, to shew that he is within the protection of the act.

The Court accordingly (*absente Grose, J.*) made the latter part of the rule absolute for staying the proceedings, on payment of the damages assessed, without costs.

Dell v. Wild.

8 East, 240. Feb. 7, 1807.

A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 J. 1. c. 8, either as a judgment upon an obligation conditioned for payment of *money only* (the recognizance being to pay money or do something else) or as a judgment upon a *contract*, which is there used in contradistinction to an *obligation*.

THE plaintiff in the action having obtained judgment in debt upon a recognizance of bail, *Scarlett* moved for leave to sue out execution, notwithstanding a writ of error brought upon the judgment; the plaintiff in error not having put in bail. The stat. 3 Jac. 1. c. 8, provides, that no execution shall be stayed by writ of error for reversing any judgment upon any *obligation* conditioned for the *payment of money only*, or upon any *contract*, &c. unless the plaintiff in error enter into a recognizance with sureties to prosecute the writ of error with effect, and to pay the debt, &c. if judgment be affirmed. And he argued, that if the recognizance of bail were not an obligation conditioned for the payment of money only, at least it was a *contract*, and as such within the act. And in *Trinder v. Watson*, 3 Burr. 1566, upon a similar motion, founded upon a judgment in debt upon a recognizance in error, Lord *Mansfield* thought that the statute, being a remedial law, ought to be liberally construed; though ultimately the point was not decided.

Lord ELLENBOROUGH, C. J. The word *contract* is used in the statute in contradistinction to *obligation*, under which this must be classed, if at all. But here the recognizance is in the alternative, to pay the money, or render the body; whereas the statute applies to obligations for the payment of money only. And the practice has accorded with this interpretation.

Per Curiam,

Rule refused.

Warrington and Another v. Furber and Warrington.

8 East, 242. Feb. 9, 1807.

A guarantee in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp act, "a contract for or relating to the sale of goods," and need not be stamped. The vendee having accepted a bill of exchange for the price of the goods, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee, may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself, and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid.

THIS was an action for money lent and advanced, and money paid to the use of the defendants, the latter of whom suffered judgment by default, and the other went to trial before Lord *Ellenborough*, C. J. in *London*; where it

appeared that in *May* 1801, the defendant applied to one *Martin* to purchase of him *Manchester* goods to the amount of 1079*l.*, and proposed the guarantie of the plaintiffs; who on *Martin's* application, afterwards gave him the following guarantie in writing, unstamped: "*Southwark, May 9th, 1801. 'Mr. Thomas Martin—at the request of Messrs. Furber and Warrington, who 'inform us that they are about purchasing goods of you to the amount of '1000*l.*, we hereby guaranty the payment of that sum, if purchases are made '—say, at a credit of six months. Your's, &c.*" (Signed by the plaintiffs.) The goods were accordingly furnished, and a bill drawn for the value, on the 30th of *May*, by *Martin* upon the defendants, at six month's date, and accepted by them. This became due on the 3d of *Dec.*; but on the 21st of *Nov.* preceding, the defendants became bankrupts, and a commission issued against them: in consequence of which the defendants were obliged to pay *Martin* 1000*l.* on their guarantie after the bankruptcy of the defendants, and brought this action to be reimbursed. The defendant *Furber* made two objections at the trial; 1st, that the guarantie in writing ought to have been stamped before it could be received in evidence: 2dly, that the bill was not proved to have been presented for payment to the bankrupts, acceptors, when it became due; without which, it was insisted, that *Martin* could not have recovered against the plaintiffs on their guarantie; who had therefore paid him the money in their own wrong. To the 1st, the case of *Curry v. Edensor*, 3 Term Rep. 524, was relied on as an answer; where a broker, upon the purchase of goods for his principal, having agreed in writing to indemnify him from loss on the resale: it was holden to be within the exception of the stamp act 23 Geo. 3. c. 58, (a) s. 4, as being a contract relating to the sale of goods. But upon a doubt whether this case were not distinguishable from that, as being an agreement relating to a future and not a present sale of goods, this point was reserved. As to the 2d, Lord *Ellenborough* was of opinion that this, not being an action upon the bill, but for reimbursement of the money paid upon a collateral guarantie of the solvency of the acceptors, to whom the goods were furnished, strict proof of the presentation of the bill was not necessary, where it was obvious that it could have been of no avail, the acceptors having been then recently stripped of all their property. A verdict was therefore taken for the plaintiffs; which was moved on a former day to be set aside, and a verdict to be entered for the defendant, on the first ground of objection, or a new trial granted on the second.

Garrow and *Espinasse* now shewed cause against the rule for this purpose; and relied, in answer to the first objection, upon the case of *Curry v. Edensor*; and upon the particular wording of the stamp acts, which did not merely exempt "contracts for the sale of goods," but "for or relating to the sale of any goods;" and the Court, in that case, considered the exemption as extending to contracts of indemnity. As to the second objection, they relied upon the answer given to it at the trial.

Sir *V. Gibbs*, in support of the rule, endeavoured to distinguish this from *Curry v. Edensor*, which turned on an agreement for the present sale of certain goods: and therefore properly a contract relating to the sale of such goods; which was relied on by Lord *Kenyon* and *Buller, J.* in giving their opinions. But this was no present sale of goods; for none were specified; but a guarantie to take effect upon any future sale, of any goods, at any time, within a certain amount. On the second point, he urged that it was material to the defendants to stand as debtors to *Martin* on the bill, whose debt must be proved under the commission, rather than to the plaintiffs, to whom they were personally liable, if at all. And as there was a possibility that they might have been able, by the assistance of friends, to have paid the bill, if

(a) The duty is enlarged by the subsequent acts 35 Geo. 3. c. 30, and 37 Geo. 3. c. 90, but the exceptions are the same.

presented to them for payment when due, and proof of such presentation must have been made by an indorsee before he could recover against a drawer; so the plaintiffs, who, as guarantees, stand in the same situation as an indorsee, ought to be held to the same proof. And they cannot voluntarily take upon themselves to pay the debt of the defendants to *Martin*, without *Martin* having used due diligence to get payment from the defendants; because it alters the situation of the latter.

LORD ELLENBOROUGH, C. J. Two points have been made; 1st, whether this be "a contract for or relating to the sale of any goods," within the exception of the stamp acts? And I think that where the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out; and we should give a liberal construction to words of exception, confining the operation of the duty. The only doubt I had at the trial arose upon reading the words of Lord *Kenyon* in the report of *Curry v. Edensor*, where he seems to lay stress on the agreement having been made at the time of the original contract of sale, and relating to the sale of the particular goods; which does not apply to the agreement in question: but giving a fair and liberal sense to the words of the exception, this agreement did relate to the sale of goods, though not of any particular goods in contemplation at the time, and therefore did not require to be stamped. This seems to be the safer construction of the acts.(1) As to the second point, the same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action upon the bill itself, where by the law merchant a demand upon and refusal by the acceptors must have been proved in order to charge any other party upon the bill; and this notwithstanding the bankruptcy of the acceptors,(2) as was recognized in the argument of *Russel v. Langstaffe*, Dougl. 515. But this is not necessary to charge guarantees, who insure as it were the solvency of their principals: and therefore if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony of making a demand upon them. The plaintiffs might fairly have said to *Martin*, that the acceptors being insolvent, and their effects assigned for the benefit of their creditors, they (the plaintiffs) would not put him to the proof of a demand upon the acceptors, which must have been fruitless, but would pay the money at once, and look to their remedy over.(3)

GROSE, J. declared himself of the same opinion; and said, that the necessity of a demand, notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or indorser of a bill, was founded solely upon the custom of merchants.

LAWRENCE, J. upon the first point, said, that the words of the stamp act were general, and there was nothing to limit them to an immediate sale of goods as between vendor and vendee: on the contrary, the observation made at the bar was material, that the exception extended not only to contracts for the sale of goods, but also to such as related to the sale of goods: and this construction seemed best calculated to give effect to the words of the Legislature. On the other point, he added afterwards, that though proof of a demand on the acceptors, who had become bankrupts, were not necessary to charge the guarantees, yet that the latter were not prevented from shewing that they ought not to have been called upon at all; for that the principal debtors could have paid the bill if demanded of them.

LE BLANC, J. In construing this revenue law we cannot give effect to the objection as to the want of a stamp, without saying that the words for the sale, or relating to the sale, of goods must necessarily mean the same thing;

(1) Vide *Kenning v. Lechis*, 13 East, 7.

(2) Vide *Whitfield v. Savage*, 2 Bos. & Pull. 279. *Esdale v. Sowerby*, 11 East, 114. *Jackson v. Richards*, 2 Caines, 343. *Ball v. Demison*, 4 Dal. 165.

(3) Vide *Philips v. Astling*, 2 Taun. 206.

but parties might make a contract for the sale and relating to the sale of the same goods by different instruments, with different objects. As to the other point, there is no need of the same proof to charge a guarantee as to charge a party whose name is upon a bill of exchange; for it is sufficient as against the former to shew that the holder of the bill could not have obtained the money by making a demand upon the bill (1)

Rule discharged.

Keene, on the several Demises of George Lord Byron and Others, against Deardon and Others.

8 East, 248. Feb. 7, 1807.

A., tenant for life, remainder to his son *B.* in tail, reversion to himself in fee, agreed with *B.* in order to relieve themselves from their debts, to bar the entail; and in 1773, they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust, to sell the *N.* estates and pay the debts, &c. and as to the *L.* estate (the only one in question), in trust that the trustees should, with the consent of *A.* and his wife, and *B.*, or the survivor, sell the inheritance in fee, and apply the purchase-money on the trusts after-mentioned: with a proviso, that the rents, issues and profits, should, until sale of the inheritance, be received by such person, and for such uses as they would have been, if the deed had not been made, and no fines levied. And as to the money arising from the sale of *L.* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee to be settled, subject to certain charges, on *A.* for life, remainder to *B.* in fee. Held,

- 1st, That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.*, &c.; and that, notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the rents, &c., as contradistinguished from the legal estate of the inheritance, which was left in the trustees. And that this was not a mere power of sale in the trustees tacked to the legal estate of the owner.
2. That though *A.* who survived his wife and *B.*, continued in possession of the *L.* estate down to 1795, when he sold it, and died sometime after; and though, after sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A.*'s lifetime, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses; or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a reconveyance by trustees where such reconveyance would be a breach of their trust; which would be the case here upon a supposition that *B.*, the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase-money of the *L.* estate. Nor is such a presumption to be made in the first instance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees.
3. That *A.*'s possession and receipt of the rents, issues, and profits of the *L.* estate, though for above 20 years after the creation of the trust without any interference of the trustees, did not shew his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust.

GEORGE Lord Byron brought this ejectment, claiming as heir at law of **Wm. John Byron**, the grandson, and of **Wm. Byron**, the eldest son of **William** the fifth Lord **Byron**, to recover possession of certain premises and coal-mines in the manor of **Rockdale**, in the county of **Lancaster**, which the defendants had purchased of the said fifth Lord **Byron** under a conveyance in

(1) [See in conformity with the principle of the text, *Gibbs v. Cannon*, 9 S. & R. 198. *Erwin v. Lamborn*, 1 Harr. Del. R. 125. *Prentiss v. Danielson*, 5 Conn. 175. But see *Phillips v. Astling*, before cited, 2 Taunt. 206. *Murray v. King*, 5 B. & A. 165. And vide also, *Holbrow v. Wilkins*, 1 B. & C. 10.—W.]

1795, *John Heaton*, another of the lessors of the plaintiff, is the surviving trustee under the deed of the 13th of *November* 1773, after-mentioned, of the estates in question. *Lady Wodehouse*, another of the lessors, is the representative of *Wm. Lord Berkley*, the surviving trustee in the act of parliament of 1747, settling these estates. And the other lessor is the surviving representative of *Cha. Montague*, the surviving trustee of a term of 500 years under the same act. At the trial before *Sutton, B.* at *Lancaster*, a copy of the act, together with the deeds of the 12th of *July* and of the 13th of *November* 1773, were proved; under which it was insisted, on behalf of the present Lord *Byron*, that his great uncle, *Wm. the fifth lord*, under whom the defendants claimed by purchase, was only tenant for life of the *Rochdale* estate with remainder to his son *Wm. Byron* in fee; and that the same descended to the present lord as heir at law of *Wm. Byron* the son, who died in the lifetime of his father; and that he became entitled to the possession thereof on the death of the late *Wm. Lord Byron* the fifth, in 1798; and that the legal estate was either in him, or in some one or other of the trustees, lessors of the plaintiff. The defendants, on the other hand, who claimed under the conveyance of *Wm. Lord Byron* the fifth, in 1795, contended that the deeds of 1773 were made only for a special purpose, which had been answered; and subject thereto that the *Rochdale* estate was, at the time of the conveyance to them, still under the limitations of the act of parliament, by virtue of which *Wm. Lord Byron* the fifth (the settlor in the deeds of 1773,) was seised of the reversion in fee, and in the events that had happened, by which the purposes of those deeds were satisfied, could make a good title to a purchaser: and that with respect to the legal estate in the reversion, either that the use was executed in the late Lord *Byron* the vendor, or that the judge would direct the jury to presume a conveyance to him from the trustees. They also insisted upon an adverse possession against the trustees for above 20 years in bar of the ejectment. The learned Judge, however, over-ruled the objection of an adverse possession, and did not instruct the jury to presume a conveyance from the trustees of the legal estate to Lord *Byron* the settlor; but directed them to find a verdict for the plaintiff, with liberty for the defendants to move to enter a nonsuit, or a verdict for themselves; in case this Court should be of opinion that the lessors of the plaintiff were not entitled to recover: on which a rule to shew cause was afterwards obtained.

The title appeared to stand thus: By a private act of parliament, passed in 1747, for settling the estates of *Wm. Lord Byron* and *Eliz. Shaw*, on their intermarriage, reciting a prior indenture, made on the marriage of the preceding Lord *Byron* with *Frances Berkley*, whereby the *Nottinghamshire* and *Rochdale* estates were limited to the use of the last-mentioned Lord *Byron* for life; remainder to the use of trustees for a term of 700 years, to raise portions for younger children; remainder to the use of the first and other sons of the marriage in tail male; with divers remainders over: and reciting that the last-mentioned Lord *Byron* died in 1736, and by his will directed the portions of his younger children to be paid out of his personal estate; and that he left issue the said *Wm. Lord Byron* his eldest son, and three younger sons and a daughter: that *Wm. Lord Byron* had then lately suffered recoveries of the settled estates, and that the inheritance of the premises, subject to the term of 700 years, was vested in him in fee; and reciting an agreement to resettlement the estates upon his then intended marriage; it was thereby enacted, that certain estates of his in *Nottinghamshire* and the *Rochdale* estate in *Lancashire* should be vested in Lord *Berkley* and the Earl of *Carlisle* and their heirs, subject to the term of 700 years, to the use of *Wm. Lord Byron* for life; remainder to the trustees to preserve contingent remainders during his life; and after his decease to secure a jointure of 500*l.* a-year to Lady *Byron* for her life; and subject thereto, remainder to *Cha. Montague* and others for a term of 500 years, upon trust to secure Lady *Byron's* jointure, and to raise

portions for younger children; remainder to the use of the first and other sons of the marriage in tail male; and in default of such issue, to such uses as *Wm. Lord Byron* by deed or will should appoint; and in default of such appointment to the use of *Wm. Lord Byron* in fee. With a power to him in the mean time to lease for 21 years under the usual restrictions.

By indenture of bargain and sale of the 12th of *July 1773*, between the said *Wm. Lord Byron*, *Wm. Byron* his only son, and certain trustees, for making a tenant to the præcipe, and suffering a recovery to bar the entail, and for limiting the *Rochdale* estate to new uses; the intended recovery (which was afterwards suffered at *Lancaster assizes in August 1773*) was declared to enure to the use of such person or persons, and for such estate or estates, and subject to such powers, provisos, and conditions, &c. as *Wm. Lord Byron* and *Wm. Byron* (his son) should by any deed appoint; and in default of such joint appointment, then as the said *Wm. Byron*, in case he should survive the said *Wm. Lord Byron*, should by any deed appoint: and in default of and until such appointment, to the same uses as were directed by the act of parliament:

By deed of settlement of the 13th of *November 1773*, between *Wm. Lord Byron*, *Lady B.* and *Wm. B.* their only son of the first part, and certain trustees and creditors of the four other parts, reciting (inter alia) certain mortgages on the *Nottinghamshire* estates in 1745, and the act of 1747, and several annuities granted in 1756 by *Lord B.* for his own life, and other annuities and charges on the same estates, and a conveyance in 1772 by *Lord B.*, his lady, and son, of certain estates in *Nottinghamshire* to secure some of the said annuities; remainder to such uses as they should jointly appoint; and in the mean time to the same uses as were settled by the act of parliament: and after securing an additional 500*l.* per annum to *Lady B.* directed the residue of the rents and profits to be received by the person or persons for the time being entitled to the reversion; with a power to the trustee, &c. to sell the premises, and apply the purchase-money as *Lord and Lady B.* and their son, with the consent of *Gould* the prior incumbrancer, by deed should direct: and a power by the same three persons, with the same consent during their joint lives, by deed to revoke the old and limit new uses. And reciting other charges by the same persons on the *Nottinghamshire* estates; and subject thereto, to the like uses as before mentioned. And reciting the indenture of the 12th of *July 1773* for suffering a recovery of the *Rochdale* estate to the uses before mentioned; which recovery was accordingly suffered in *August* following. And reciting further, that *Wm. Lord B. alone*, and that *he and his son jointly*, were indebted to divers persons, in large sums of money, in part secured by judgments, and that the interest of their debts and annuities greatly exceeded the annual income of the whole estates, and that their creditors were very pressing, and that they could only redeem themselves by sale of part of the estates; and that they had agreed with the trustees and incumbrancers that all the prior uses should be revoked, and a prior annuity of 700*l.* to *Wm. Byron* the son be extinguished; and in lieu of it that certain estates in the county of *Nottingham* should be settled for securing to *Wm. B.* an annuity of 310*l.*; and subject thereto to the use of *Lord B.* for life, &c. remainder to *Wm. B.* in fee; and that a term should be created of all the other estates in *Nottinghamshire* for raising 11,000*l.* portions for younger children in discharge of the other settled estates; and that the reversion of the *Nottinghamshire* and all the *Lancashire* estate should be vested in trustees to sell the same; and out of the purchase money of the *Nottinghamshire* estates to pay all the specialty debts of *Lord B.* and *Wm.* his son, and also to pay *Wm. B.* 2000*l.* and the residue to *Lord Byron*. And that the money arising by sale of certain premises in *Nottinghamshire* and of the *Lancashire* estate should be laid out in the purchase of other estates, to be settled to trustees conditionally to raise 385*l.* per annum for *Wm. B.* during the joint lives of himself and *Lord B.*, and subject thereto to *Lord B.* for life,

remainder to secure 500*l.* to Lady *B.* for life, with remainder to Wm. *B.* in fee—the dead proceeded to revoke the prior uses, and to appoint the *Rochdale* estate in *Lancashire*, and other estates in *Nottinghamshire*, to new uses; with a covenant to levy fines, &c.: and the estates were thereby conveyed to the trustees *Heaton* and *Kennett*, and their heirs, to the following uses; as to part of the *Nottinghamshire* estate, to secure 115*l.* per annum to Wm. *B.* during the joint lives of himself and Lord *B.*; and subject thereto, to the use of Lord *B.* for life, remainder for a term of 80 years to secure 500*l.* per annum to Lady *B.*; remainder to Wm. *B.* in fee. In trust, however, to suffer the person entitled to the reversion to take the surplus of the rents of the premises which should not be mortgaged or sold for the purposes aforesaid. And as to other estates in *Nottinghamshire* to the use of other trustees for a term of 1200 years, upon trust by sale or mortgage to raise the 11,000*l.* for portions, &c. and to pay the surplus to *Heaton* and *Kennett*. And as to the last mentioned premises, subject to the said term, and also as to the estate of *Rochdale* in *Lancashire*, to the use of *Heaton* and *Kennett*, and their heirs, upon trust that they or the survivor should with the consent as well of the said Lord *Byron*, Lady *B.*, and Wm. *B.* or the survivor of them, as of *Gould*, (the prior incumbrancer) in writing, sell the inheritance in fee, subject as to certain parts to the term of 1200 years; and on further trust, that *Heaton* and *Kennett* and the survivor, &c. should apply the money arising by sale of the *Nottinghamshire* estates, first in discharging the specialty debts, joint or several, of Lord *Byron* and Wm. *Byron*, and redeeming their annuities charged on these estates; next to pay Wm. *Byron* 2000*l.*, and the residue to Lord *Byron*, to enable them to discharge their other debts: and should stand possessed of the money arising by sale of the *Lancashire* estate, &c. on the trusts after-mentioned; with a proviso that the rents, issues, and profits, as well of the premises comprised in the term of 1200 years as of the *Lancashire* estate, &c., should until sale of the inheritance, be received by such person and for such uses as the same rents, &c. would have been if these presents had not been made and no fines levied. And as to the money arising from the sale of the *Lancashire* estates, &c. in trust to invest the same with the approbation of Lord and Lady *Byron* and Wm. *B.* &c. in the purchase of other lands in fee, to be settled to the use of the trustees of the term of 1200 years, or some other person to be appointed by Wm. *Byron*, for the term of 60 years, if Lord *B.* and Wm. *B.* should so long live, to secure his annuity of 385*l.*; remainder to Lord *B.* for life, remainder to Lady *B.*, to secure her annuity, &c. remainder to Wm. *B.* in fee. With other provisions not material. By deed poll of the 14th February 1774, executed by *Gould*, Lord *B.* and Wm. *B.* it appeared, that 50,500*l.* was raised by sale of estates in *Nottinghamshire*, to facilitate which *Gould*, by direction of the other two, granted and released those estates to the trustees.

Sir *V. Gibbs*, *Park*, and *Heywood*, Serjt. shewed cause, and contended, first that under the deeds of 1773, the fee was not executed in the late Lord *Byron*. Under the act of parliament he took an estate for life, remainder to his son *William* in tail male, with a reversion in fee to himself. But by the deed of November 1773, after the recovery suffered, which barred the entail, the *Nottinghamshire* and *Lancashire* estates were conveyed to trustees, in trust to sell the whole, and out of the purchase-money of the *N.* estate to pay the joint and several specialty debts, and redeem the annuities, of Lord *B.* and his son, and to apply the surplus in the manner therein directed: and to lay out the purchase-money of the *L.* estate, with the approbation of Lord and Lady *B.* and their son, or the survivor of them, and the consent of *Gould* the incumbrancer, in the purchase of other lands to be settled to the use of trustees for securing certain payments; remainder to Lord *B.* for life, &c. remainder to Wm. *Byron* in fee: with a proviso that until the sale of the inheritance, the rents, issues, and profits should be received by such person and for such uses as were before settled. Under the new settlement, therefore, as Lord *B.*

took only a life estate, with remainder to his son *Wm.* in fee, the use could not be executed in the late lord, so as to enable him to pass the legal estate in the reversion to the defendants claiming from him by purchase; but it must be executed in the trustees and their heirs, to enable them to sell and execute their trust. Secondly, supposing the legal title in the trustees, there could be no presumption of a reconveyance by them to Lord *B.* to the old uses; because that would have been a breach of trust, which cannot be presumed. *Wm. Byron*, for whom, as well as for his father, they were trustees, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him in the newly purchased lands, by having joined in barring his former estate tail, and charging the *Nottinghamshire* property with the payment of his father's debts and annuities. The trustees could not have conveyed in fee to Lord *B.*, without the consent of his son, which cannot be presumed in disherison of himself. Then the proviso, that *till the sale, the rents, issues, and profits*, should go to and be enjoyed by such person, &c. as before the fines levied, could not alter the disposition of the legal estate: the surviving trustee would still be entitled to the possession, in order to enable him to sell in pursuance of the trust, though the rents in the mean time were payable to Lord *B.* during his life. At any rate, if there were any equity arising on the face of the deeds in favour of Lord *B.*, cognizance could only be taken of it by a court of equity. [It having been suggested by one of the defendant's counsel, that he meant to contend that it ought also to have been left to the jury to presume that the trustees had in execution of their trust sold the *Lancashire* estate, and that Lord *B.* had been the purchaser.] They answered, that the presumption had not been put upon that ground at the trial: but even that could not be sustained without imputing a breach of trust to the trustees, in having applied the purchase-money to their own use, instead of laying it out in the purchase of other lands; which, if it had been so applied, was capable of direct proof. And no such presumption arose of necessity from Lord *B.*'s possession for so many years, as that was consistent with the deed of *November 1773*, and must be referred to that, unless a subsequent conveyance to him as a purchaser from the trustees were proved. The third objection, upon the point of adverse possession by Lord *B.* and the defendants who claimed from him for 20 years before this ejectment was brought, was abandoned: for, as was observed, the possession of *cestuy quo trust* can never be said to be adverse to his trustees; and the conveyance to the defendants, whose possession alone could be said to be adverse to the trustees, was only in 1795.

Cockell, Serjt., *Topping*, *Wood*, and *Yates*, in support of the rule, contended, first, that the use was not executed in the trustees under the deed of *November 1773*, nor was it necessary that they should have the legal estate for the purposes of that deed. By the deed of *July 1773*, to lead the uses of the recovery, the estate was to be limited to such uses as Lord *B.* and his son jointly, or as the son, if he survived his father, should appoint; and in default of and until such appointment the recovery was to enure to the same uses as were directed by the act of parliament; under which Lord *B.* had an estate for life, with the reversion in fee, after an estate tail in his son. The express object of the deed of *November 1773* was to relieve Lord *B.* and *Wm.* his son from the pressure of their debts; both of whom, it appears from the recital, were much involved. For this purpose the *Nottinghamshire* estates were at all events to be sold, and the purchase-money applied in discharge of the debts, and after payment of a certain sum to *Wm. Byron*, the overplus, if any, to go to Lord *B.* But the *Lancashire* estate, which it was considered might not be required for the payment of the debts, was not to be sold at all without the joint consent of Lord and Lady *B.* and their son (with the approbation of *Gould* the incumbrancer), or the survivor of them; and until the sale it was provided, that the *rents, issues, and profits*, which are in effect all

the interest in the land, was to be received by such persons and for such uses as they would have been if that deed had not been made and no fines levied. In substance, therefore, the estate stood limited to the old uses till the sale; and only a *power* of selling was reserved to the trustees upon the contingency of Lord and Lady *B.* and their son, or the survivor of them, consenting to it. All these persons are now dead: *Wm. Byron* died about 30 years ago, leaving a son, who is also dead: Lady *B.* died about 11 years ago: *Wm. Lord B.* survived the others, and is now dead: so that this part of the trust is now incapable of being executed for want of the consent of competent parties. The contingency, therefore, never happened which was to supersede the old uses, which old uses were to remain until those three persons, or the survivor, consented to a sale. In *Roper v. Radcliffe*, 9 Mod. 190, Lord C. J. *Parker* says, that a trust to sell is but a *power* till executed: and that if one seised in fee give power to his executors to sell his lands, and to pay the money or surplus to his heirs; till that power be executed, the old fee descends to the heir. Here the case is stronger against the execution of the use in the trustees before the sale; because they had no discretion in making the sale; but it depended upon the contingency of the owners' consent. There is no direction in this case for the trustees to receive and *pay over* the rents, &c. till sale; which would have executed the use in them. Here there was no trust to be executed by the trustees before sale. 2dly, Lord *Byron* having been in the possession of the premises in question since 1747, treating them as his own, without any interference of the trustees, and no other title appearing to the world except under the act of parliament, the defendants, who are purchasers for a valuable consideration, without notice, after the death of *Wm. B.* and his son, and the extinction of the estate-tail, which let in the old reversion, are entitled to have every presumption made in their favour which the law will allow of. Admitting, therefore, that the legal estate was in the trustees by the deed of *November 1773*; yet as it appears that 50,000*l.* was raised by the sale of the *Nottinghamshire* estates in 1774; the first presumption to be made is, that that was sufficient to liquidate the debts and to answer all the purposes of the trust, since no other act has been done from that time by the trustees: and therefore they must be presumed to have re-conveyed the *Rochdale* estate to the old uses. At no time could that estate have been sold without the consent of Lord *Byron*, and as he survived Lady *B.* and his son, he may well be presumed to have notified to the trustees that he would not consent to the execution of the power of sale by them under the deed of *November 1773*, and to have called upon them for a reconveyance of the legal title. This, if it had been done in the lifetime of the son, and with his consent, would in no event have been a breach of trust. Nor if done after his death; for the remainder in fee was only limited to him in the event of a sale of the *Rochdale* estate and the purchase of another estate; but Lord *B.* never consented to such a sale, and without his consent, who was the survivor of his wife and son, it could never take place. And, independent of this contingent remainder in fee to the son, there was an ample consideration moving to him to join as tenant in tail in charging the *Nottinghamshire* estate with his father's debts, as provision was also made for the liquidation of his own debts out of the same fund during the life-estate of his father. It ought, therefore, to have been left to the jury to say, whether, under all the circumstances, such a reconveyance had not been made to the old uses, which might consistently have been made without any breach of trust? [*Per Curiam*. The defendants were not prevented from going to the jury upon this presumption, if they had insisted upon it: but instead of that they preferred taking the opinion of the judge; whether the presumption ought not to be made: and he thinking that the jury ought not to make it, they acquiesced. The question, therefore, must now be argued as if it had been left to the jury with the Judge's opinion against the presumption; and it is only competent to the de-

defendants' counsel to contend that, under these circumstances, the Judge ought to have directed the jury differently.] It was said by Lord *Kenyon*, in *Doe v. Sybaurne*, 7 Term Rep. 3, and in *Roe v. Reade*, 8 Term Rep. 122, that in all cases where trustees ought to convey to the beneficial owner, he would leave it to the jury to presume such a conveyance, where such a presumption might reasonably be made: and that cannot apply more strongly than to a case where the trust could not be further executed for want of Lord *Byron's* consent. [*Le Blanc*, J. We must consider how the interest of *Wm. Byron* would stand upon this construction. He who was tenant in tail of both estates had consented to the sale of the *Nottinghamshire* estate for the purpose of paying his father's debts, upon condition that both the estates should be sold, and new estates purchased, which were to be settled upon his father for life, *remainder to himself in fee*. He and his heirs would therefore be deprived of his consideration, if, in consequence of his father having survived him, the old use were to be executed in his father; or if the trustees had reconveyed to the old uses. How then can we say, that they must be presumed to have made such a reconveyance?] The payment of the son's debts in the lifetime of the father was a fair consideration for the son's consent, and any further consideration was made optional in the father during his life, who might conscientiously refuse it, especially after the son's death. But, 3dly, If the other presumption be not made, it may be presumed at this distance of time in favour of purchasers for a valuable consideration, without notice, that the *Rockdale* estate was sold by the trustees in execution of their trust, with the consent of the necessary parties, together with the rest of the property; and that Lord *Byron* himself was the purchaser: and his undisturbed possession for so many years, treating the estate as his own, without any intervention of the trustees, would be evidence of such a purchase.

Lord ELLENBOROUGH, C. J. Three points were made on moving for the rule in this case; one of which, namely, an adverse possession for above 20 years against the trustees, has been since abandoned. The remaining points now insisted upon are, 1st, that the use was executed in Lord *Byron* under the deeds of 1773: or, if not, 2dly, that the trustees must be presumed to have conveyed to him, either because the trusts were all satisfied; or, as it has also been argued, as to a new purchaser under a sale by the trustees. First, the conveyance of *November 1773* is to trustees and their heirs for certain uses; amongst others, in trust to sell the estates in *Nottinghamshire*, and thereout to pay the debts of Lord *Byron* and his son, and for other purposes mentioned: and as to the *Rockdale* estate, to the use of the trustees, *Heaton* and *Kennett* and their heirs, upon trust that they or the survivor should, with the consent of Lord and Lady *Byron* and their son, or the survivor of them, &c. sell the inheritance in fee, subject to a certain term, and invest the purchase-money, with the like consent, in the purchase of other lands in fee, to be settled to the use of the trustees of the term; remainder to Lord *Byron* for life, &c.; remainder to *Wm. Byron* in fee. It cannot be doubted, upon these words, but that the use would be executed in the trustees under that deed. But it is argued, that the effect of those words is controuled by the proviso, stating that the *rents, issues, and profits* should, *until sale* of the inheritance, be received by such person and for such uses as the same rents, &c. would have been if that deed had not been made and no fines levied. That, however, is nothing more than the common provision in such cases for the perception of the rents and profits by the persons beneficially entitled at the time until the sale, and by no means carries the legal estate to such persons. And in order to found the argument that it did, the defendants' counsel were driven to contend, that the words *rents, &c.* were of equal import in the place where they occur with the word *inheritance*; and this, notwithstanding, it is evident that the former words are used in the proviso in contradistinction to the latter. Instead, therefore, of shewing that nothing more than a mere

power of sale was intended to be given to the trustees, the wording of the proviso confirms the construction which would naturally arise from the other parts of the deed, and shews that the meaning of it was to leave the legal estate in the trustees, to whom it was before limited for the general purposes of the deed; stipulating only that the *rents, issues, and profits*, as contradistinguished from the *inheritance*, should, until a sale took place, be received by those who were beneficially entitled to them. Then, as to the presumption of a reconveyance from the trustees to Lord *Byron*; presumptions of this sort, when fit to be made, are always made in favour of the possession of those who are rightfully entitled to it. The rule of presumption is, *ut res rite acta est*; and is applied, wherever the possession of the party is rightful, to invest that possession with a legal title. But there is nothing to warrant such a presumption in this case: the possession of Lord *Byron* was all along consistent with the deed and with the title of the trustees; for until a sale by the trustees Lord *Byron* was entitled to the possession by the trusts of the deed. The trustees could not controul his right to the receipt of the rents, issues, and profits during his life. There was not, therefore, one moment of adverse possession to the trustees during the whole time down to a recent period; nor any such possession by Lord *Byron*, or any other claiming from him, in favour of which there should be a presumption of any conveyance to him: a presumption which could only be made on the supposition of a direct breach of trust by the trustees, whose duty it was, in case of a sale, to have purchased new estates to be settled on Lord *Byron* for life only, with remainder to *Wm. Byron* in fee. And the law will not raise a presumption upon a supposed breach of trust.

GROSE, J., not having been in court when the case was argued by some of the counsel on a former day, declined giving any opinion upon it.

LAWRENCE, J. The third ground of objection originally taken to the verdict having been abandoned, it is not necessary to advert to it. Then as to the first objection, that the use was executed in Lord *Byron*: in order to found the argument, the clause which follows last in the deed by way of proviso is put forward as the first and substantive limitation: whereas the use is clearly executed in the trustees by the first part of the deed, unless the effect of the proviso is to over-ride the whole, and to precede the other limitations. As it stands, the *Rochdale* estate is limited to the use of the trustees, in trust to sell it, with the consent of the parties interested, and to reinvest the purchase-money in other lands to be settled to different uses. This would execute the use in the trustees; but as before sale, the rents, issues and profits of the estate were to be received by somebody, it is provided in the subsequent clause that, till sale of the inheritance, they should be received by such persons as would have been entitled to them under the former settlement, if the deeds of 1773 had not been made. In the first place, therefore, there is an absolute conveyance to the trustees, to give them the legal estate, and enable them to sell, &c., and apply the purchase-money; and then a proviso declaring how the rents, &c. should go in the meantime. The second point made, is, whether, under the circumstances, a reconveyance to Lord *Byron* is to be presumed. This is pressed on the authority of cases where Lord *Kenyon* said that he would direct the jury to make such a presumption where the trustees *ought* to convey. And in order to shew that they ought to have conveyed in this case, it is insisted that after the death of Lady *Byron* and her son *William* the trust was for the sole benefit of Lord *Byron*: but how can we say that, when it appears that *Wm. Byron* had joined in barring his estate tail in all the estates, and enabling the trustees to raise money by sale of the *N. estates* for the payment of his father's debts, reserving to himself the remainder in fee of the property which was to be newly purchased out of the proceeds of the *Rochdale* estate when that should be sold? How can we say, that the trustees ought to be presumed to have conveyed that title

to Lord *Byron*, which he had no right to ask them to convey, in prejudice to those claiming from his son? But if Lord *Byron* had an equitable estate in the premises, and *Heaton* and *Kennett* were trustees for him alone after the death of his wife and son; let that first be decided by a court of equity, and then that court may, if it think proper, send the case to a jury to say whether they will not presume a reconveyance. As to Lord *Byron's* being a purchaser, under a sale by the trustees, of this estate, there is nothing in fact to raise the presumption.

LE BLANC, J. The point of adverse possession to the trustees for 20 years was properly given up: for when it is considered that Lord *Byron* till a sale was entitled to the possession and to the receipt of the rents and profits consistently with the deed, and did not convey to the defendants till 1795, it is impossible to say that there was any adverse possession to bar the trustees from recovering in this ejectment. Then as to the use being executed in Lord *Byron*; the argument can only arise by coupling the proviso with the previous limitation of the use to the trustees, and making it take place of the use before executed in them. But that would be contrary to the form and effect of the deed, by which the use is executed in the first instance in the trustees, subject to the trusts afterwards declared, and subject to the proviso that until sale the persons before entitled should receive the rents, issues, and profits. It is said, however, that giving the rents, issues, and profits to those persons is the same as giving them the estate; and it may be so where there is no conveyance of the land itself to others, and where the instrument does not in the terms of it point to a distinction between them; but here the legal estate is distinctly separated by the terms of the deed from the rents, issues, and profits; and these latter are given to one person, and the legal estate to others. Then it is contended that the jury should have been directed to presume a reconveyance of the legal estate from the trustees to Lord *Byron*. Such a presumption may be made where it is necessary to cloath a rightful possession with a legal title: but the Court must first see that there is nothing but the form of a conveyance wanting. And in no case can such a presumption be made where it would have been contrary to the duty of the trustees to have reconveyed to the party. And though if there had been shewn to be a clear equitable title in Lord *Byron* to the remainder in fee, the Court might have directed such a presumption to be made in this case; yet, if a doubtful equity only appeared, a court of law would not give such a direction before a court of equity had declared in favour of the party's equitable title. Now here Lord *Byron* having originally an estate for life, with remainder to his son in tail, remainder in fee to himself; and it being considered that in the course of nature the son would survive the father; they came to an agreement that the *Nottinghamshire* estates should be sold, to pay their debts; and that the *Rochdale* estate should, with the joint consent of the father, mother, and son, and of the survivor of them, be sold and the purchase-money applied to the purchase of a new estate, which was to be limited to Lord *B.* for life, remainder to his son in fee: providing that in the mean time, and until the sale of the estate, the rents, issues, and profits should be received by the person who was before entitled to them. Therefore, till Lord *Byron* consented to the sale his possession and receipt of the rents, issues, and profits were consistent with the very terms of the deed, and with the object of the trust; and consequently there is no ground for presuming a conveyance of any description.

Rule discharged.

Hodinott v. Cox.

8 East, 268. Feb. 10, 1807.

In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid.

BURROUGH had moved to change the venue from *London* to *Somersetshire*, in an action of covenant on a lease of certain silk mills and a stream of water thereunto belonging; in which breaches were assigned for diverting the water from the mill, and for not keeping up the water to its former level: the grounds of the motion being, that the greater part of the defendant's witnesses lived in *Somersetshire*, and that a view would be necessary.

Marryat now opposed the rule, on affidavits, stating that more of the plaintiff's witnesses lived in *London* than in the country, and that it would be more expensive to him to try it at the assizes than at the sittings: and urged that it was not usual to change the venue in actions on specialties, except, as in *Foster v. Taylor*, 1 Term Rep. 781, where *all* the witnesses resided in the county to which the trial was removed. And he attempted to shew by the pleadings that the cause might be as well tried with the aid of a map as by a view. But

The Court, considering that a view would be desirable in this case for the furtherance of justice, made the rule absolute, on the defendant's undertaking to have a view, and to admit the lease.

The King v. Bartrum.

8 East, 269. Feb. 10, 1807.

Upon an indictment for perjury removed into *B. R.* by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant.

THIS was an indictment for perjury, found at the Sessions, and removed into this court by *certiorari*. Notice of trial was given to the defendant by the prosecutor for the sittings at *Westminster* and the indictment entered for trial; but when it was called on in turn, the prosecutor was not ready; on which the defendant desired it might not be struck out of the paper, but stand as the last cause. And when it was again called on, the prosecutor withdrew the record.

Garrow thereupon moved, on the first day of the term, for a rule upon the prosecutor to shew cause why he should not pay the defendant his costs for not proceeding to trial pursuant to notice: grounding his application upon the general jurisdiction of the Court to prevent its process from being used to the oppression of the subject; and referring to *Rex v. Heydon and Others*, 3 Burr. 1304, where the same thing was done in the case of informations for bribery. And he also produced an affidavit that the prosecutor had since declared, that he did not mind ruining himself if he could ruin the defendant.

Lawes, contra, endeavoured to throw some doubt upon the legality of the practice, as applied to indictments for public misdemeanors in general, especially one of so serious a complexion as the present; and said that the practice was calculated to discourage prosecutions. But

Lord ELLENBOROUGH, C. J. said, that upon inquiry it appeared to have been the established practice of the Court, that if the prosecutor give notice of trial to the defendant, and do not try his indictment, nor countermand the notice in time, he must pay the costs of the trial as in other cases: for otherwise defendants might be harassed, and oppressed with unnecessary expence.

That Lord *Mansfield*, in the case referred to, laid down the rule generally, saying that such was the constant course of the Court: and that the precedents referred to in the margin(a) of the report bear out the proposition.

Per Curiam,

Rule absolute.

The King v. The Mayor and Burgesses of Thetford.

8 East, 270. Feb. 11, 1807.

A charter having granted that upon the death or amotion of a principal burgess, (*who is appointed to hold for life*) it should be lawful for the mayor and the remaining principal burgesses, *within eight days next following* to elect another; the eight days after a vacancy having slipped without an election, a *mandamus* was granted upon the st. 11 G. 1. c. 4. s. 2, to make an election.

WILSON, on a former day, applied on the stat. 11 G. 1. c. 4. s. 2, for a rule calling on the defendants to shew cause why a writ of *mandamus* should not issue commanding them upon the day and at the time to be prefixed in such writ to assemble themselves in the *Guildhall* of the borough, &c. and then and there proceed to the election and swearing in of two principal burgesses of the borough in the room of *W. R. Mingay, Esq.* and *J. Rolfe, Esq.* deceased. He stated the constitution of the borough, under a charter of *Elizabeth*, to consist of a mayor, 10 principal burgesses, and 20 of the commonalty, incorporated by the name of the mayor, burgesses, and commonalty of the borough of *Thetford* in the counties of *Norfolk* and *Suffolk*. That the 10 principal burgesses were, together with the mayor, constituted the common council of the borough for acts and ordinances concerning the public interests of the inhabitants of the borough. And that when any burgess should die or remove out of the borough, or be removed from his office for any reasonable cause, it should be lawful for the mayor and burgesses from time to time, as they should think fit and expedient, *within eight days next following* the death or removal of the said burgess, in the *Guildhall* or other convenient place within the borough, to meet at their will, and there to nominate one or more inhabitants of the borough to be a burgess or burgesses of the said borough *during life*, if it should seem good and expedient to the mayor and the other burgesses; and that every person so named and chosen should take an oath before the mayor to execute his office faithfully. The affidavit then stated the death of *Mr. Mingay*, one of the principal burgesses, in *November* last, and the death of *Mr. Rolfe*, another of them, in *December* last, and that the vacancies had not been filled up.

When the motion was made, *Lawrence, J.* asked whether there were any instance of a *mandamus* granted upon the stat. 11 G. 1. c. 4. s. 2, except in the case of *annual officers*: and there being no precedent of any such referred to, or within the recollection of the officers of the Crown office, it was intimated that an inquiry should be made into the matter, and that the rule should not be made absolute, without directing the attention of the Court to the question. This was now done; and *The Court*, after being apprised that the principal burgesses were appointed for life, and that the charter required the vacancies to be filled up within eight days; which had been slipped; and being referred to the case of the corporation of *Scarborough*,(b) which was

(a) *Rez v. Allen and Hazard*, Comp. 225. *Rez v. Edwards*, Ib. 410, and *Salk*. 193. *Rez v. Powell*, 1 Stra. 33, and *Rez v. Earl*, 2 Stra. 874, and vide *Rez v. Langfeld*, 2 Stra. 937, and *Rez v. Moore*, ib. 946.

(b) 2 Stra. 1180. *Mr. Ford's* note of this case has not the word *annual*, which is introduced in *Sir John Strang's* Report: but it runs thus: "It was likewise moved for a *mandamus* to be directed to such of the capital burgesses as were capital burgesses in the year 1736 to proceed to the election of coroners and other officers, according to the statute, &c. So that no stress seems to have been laid upon the circumstances of such other officers being *annual officers*." The proper title of that case is "*The King against Vickerman and Others*."

the case of a *warrant* upon the statute to elect annual officers, and to the case of *Re v. Woodrow*, 2 Term Rep. 732, referring to the former; upon due consideration of the words of the statute; which are not confined to annual officers, but directs the *warrant* to issue if no election be made of the mayor, bailiffs, or other chief officer or officers of the borough, upon the day, or within the time appointed by charter or usage for that purpose; made the Rule absolute. (a)

Kensington v. Inglis and Another, in Error.

8 East, 273. Feb. 12, 1807.

1. Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents; the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum book for the private information of himself and the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him; for such book, if in court, would not have been evidence *per se*; but could only have been used by the witness to refresh his memory.
2. Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th section of the stat. 35 G. 3. c. 63, which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c.
3. Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licenced by the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue.

THE plaintiffs below brought their action in *C. B.* against the defendant, an underwriter on a policy of insurance made the 5th of February 1800, lost or not lost, at and from the *Havannah* and *Matanzas*, or any other port or ports in *Cuba*, to *Nassau*, *New Providence*, upon goods, and also upon *ship or ships sailing between the 1st of October 1799, and 1st of June 1800 inclusive*; beginning the adventure on the goods from the loading thereof on board the said ship or ships in the island of *Cuba*; and upon the said ship or ships, &c. with liberty to proceed to and touch and stay at any ports or places whatsoever: valued at — on goods and specie, covering commission and all charges incident to loss: at six guineas per cent. premium; warranted free from captures and seizures and the consequences of any attempt thereof The declaration averred, that the defendant subscribed the policy for 500*l.* on

(a) Vide the case of *Hicks* against *The Town of Launceston in Cornwall*, 1 Rol. Abr. 513, 514, where it was ruled by two Judges in court, that if the king create a corporation consisting of a mayor and eight aldermen, with a clause, that upon the death or amotion of any alderman it shall be lawful for the mayor and the other aldermen, *within eight days after such death or amotion to elect another alderman in the place of the other, &c.*; although there be no election *within the eight days* after the death, &c. yet they may elect an alderman at any time afterwards by the power incident to them as a corporation: and this affirmative power to elect within eight days does not toll their incidental power. *E. 8 Car. 1. B. R.* and a writ was granted accordingly to elect another alderman:

ship, and the voyage. That the witness knew the *Hector* to be a *Spanish vessel, the property of a Spaniard*; and that she was so described in the licence; and a certain *Spaniard*, whose name the witness does not remember, was therein stated to be the master. That formerly licences were granted in blank; but that was prohibited before the time when the said licence was granted to the *Hector*. That by the laws of *Spain* vessels coming from a *Spanish* settlement in time of war cannot clear for a *British* port; but that it is the practice for them to clear for some other *Spanish* or a neutral settlement. That the witness kept a *memorandum-book*, in which he made entries of the licences for his own and the governor's information; that they might know what licences had been granted. That he does not know where the said book is now; that he gave it to the governor when he came to England in 1801; and that the governor is now in the *East Indies*; and the witness does not know what the governor did with the book. That the licence was granted before there was any regulation at *New Providence* respecting a limited time for the duration of the voyage. That he does not recollect how many licences were granted to *R. Read* between October 1799 and October 1800; but thinks there might be ten or twelve. That Governor *Dowdeswell* was at *New Providence* between three and four years up to April 1801; and that during the whole of this time *R. Read* publicly carried on trade with the *Havannah*. Whereupon the defendant's counsel, having before long resisted any *parol evidence* as to the contents of the supposed licence for the ship *Hector*, objected that the voyage and trade insured, and on which the *Hector* was lost, being altogether illegal, unless authorized by a regular licence; and no licence for the ship, nor the before-mentioned book, being produced; no action could be sustained for the aforesaid loss. And they further objected, that notwithstanding the voyage and trade should have been licensed, and the licence satisfactorily proved, the plaintiffs could not in a court of law enforce a policy for the benefit of *Juan Villas*, so being such alien as aforesaid. But the Chief Justice delivered his opinion, that it was sufficiently established in proof by competent evidence, that the *Hector* had been duly licensed for the voyage upon which she was lost; and his opinion also, that a ship belonging to an alien might, when so licensed, be lawfully insured by a British subject: and that the policy effected therein might be enforced in a Court of law for the benefit of such alien owner thereof. And with that direction he left the issue to the jury, who thereupon gave a verdict for the plaintiff, with 300*l.* damages. Whereupon the counsel for the defendant excepted to the aforesaid opinion and direction of the Chief Justice, as well in respect to the establishment in evidence of such supposed licence, as in respect to the plaintiff's right to maintain an action for the interest of *Juan Villas*; and also in respect of the admissibility of the unstamped memorandum of the 11th of June 1800.

In the course of the argument it was attempted to be contended, on the part of the plaintiff in error, that the licence itself was void; either as an infringement of the colonial navigation laws, which confined the trading of our colonies to this country, and could not be dispensed with by the licence of the king alone; or supposing such a dispensing power in the king *jure coronæ* in matters of trade, yet that he could not delegate such discretionary power to any other person, and consequently could not enable the governor of the *Bahama* Islands to grant the licence in question. But all the Court agreed that the plaintiff's counsel was precluded from insisting upon this objection, inasmuch as it arose, if at all, out of the evidence stated in the bill of exceptions; in arguing which the plaintiff in error was confined to the objections taken at the trial, and stated on the face of the bill of exceptions; as had been lately decided in the House of Lords, in a case of *Rowe v. Power*, 2 New Rep. 36, on a bill of exceptions from *Ireland*.⁽¹⁾ Whereas the present bill of excep-

(1) Vide *Baring v. Shippen*, 2 Binn. 168; per *Feates, J.*

tions rather proceeded upon the admission that such a licence, if it existed in fact, would be good: for it insisted that the voyage and trade insured were illegal, *unless authorized by a regular licence*, and that there was no *competent evidence* of such a licence. On the other parts of the case,

Marryat, for the plaintiff in error, objected, 1st, that there was not sufficient evidence of the licence. 2dly, That the memorandum of the 11th of *June*, inasmuch as it varied the original contract in the policy, could not be given in evidence without a new stamp. 3dly, Supposing the licence and memorandum to have been properly authenticated; yet that the policy being upon the *ship*, as well as upon the *goods*, the former of which was the property of an alien enemy, the action was not maintainable in time of war for his benefit. First, he argued that there was no sufficient proof of the loss of the licence itself to let in the secondary evidence of its contents: and at any rate, that the secondary evidence given was not the best which the nature of the case afforded, for want of producing the secretary's memorandum-book, in which the entries of the licences granted had been made. The full substance of this objection, and the arguments urged in support of it, being stated in the judgment afterwards delivered, need not be here repeated. 2dly, He contended that the memorandum of the 11th of *June* so far varied the contract stated in the policy as to require a new stamp, and did not come within the exception of the 13th section of the stat. 35 Geo. 3. c. 63.(a) It was not merely an alteration of the terms or conditions of the same voyage before insured, but introduced altogether a new subject of insurance. The precise subject of insurance was marked only by the time mentioned in the original policy; for neither the ships nor the particular goods were mentioned: it extended only to such specie and goods to a certain amount as should sail in any ship or ships within a given time: the original time therefore made an essential part of the description of the thing insured: that expired on the 1st of *June*; and it was not till the 11th that the extension of time was agreed upon; within which extended time the loss happened. The risk, therefore, had attached upon the first class of ships which sailed within the period mentioned in the policy, and was at an end before the risk on the second class described in the memorandum commenced, which was to sail within a different period. The insurance on the second class could never have attached on the first. Even an insurance on the same ship for five months, to commence after the expiration of an antecedent insurance on it for six months, would be a distinct contract; a fortiori therefore, if the two insurances were made on goods on board different ships. 3dly, At any rate all insurance of an enemy's property is illegal; *Potts v. Bell*, 8 Term Rep. 548; and no action can be maintained, *flagrante bello*, for the benefit of an alien enemy residing in the hostile country; though the action were commenced and plea pleaded during an interval of peace. Lit. s. 198. Nor does it vary the case that the action is prosecuted in the name of an agent who is a *British* subject; as in *Brandon v. Nesbitt*, 6 Term Rep. 23, and *Bristow v. Towers*, Ib. 35: and the objection may be taken at any time before judgment, *Le Bret v. Papillon*, 4 East, 502, if it in any manner appear upon the record, though not regularly pleaded: in which case the judgment is, that the plaintiff be barred from further having or maintaining his action. In *Ricord v. Bettenham*, 3 Burr. 1734, indeed an action upon a ransom bill given in war to an alien enemy was maintained in

(a) The stat. 35 Geo. 3. c. 63. s. 13, provides that the act shall not extend "to prohibit the making of any alteration which may lawfully be made in the terms or conditions of any policy of insurance, duly stamped as aforesaid after the same shall have been underwritten, or to require any additional stamp duty by reason of such alteration; so that such alteration be made before notice of the determination of the risk. originally insured, &c.; and so that the thing insured shall remain the property of the same person or persons; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration."

time of peace; but no such action is maintainable in time of war, *Anthorn v. Fisher*, Dougl. 648, n. It is no answer to say, that the trade itself having been licensed, every thing necessary for the carrying it on must be licensed also. For the licence, which is the sole act of the king, cannot do more than dispense with the peculiar rights and prerogatives of the crown. It protects the trader from the capture of *British* ships at sea: it allows him to import the goods, and exempts them from seizure when landed: it dispenses with the forfeiture to the crown, either as a droit of Admiralty or otherwise: but it cannot remove his personal disability, as an alien enemy, to sue either in his own name or in the name of his trustee; a disability, founded in the common law for the benefit of the king's subjects: it cannot place him in the condition or give him the privilege of a natural-born subject in this respect.

The Court told *Carr*, for the defendants in error, that he need not argue the first point, as to the admissibility of the evidence of the licence: for the facts stated shewed either that the original was actually lost or destroyed, or at least that it was put in a necessary course of destruction; and could not now be expected to be produced. That the same sort of evidence of the probable destruction of an original paper was admitted upon the trial of *Mr. Justice Johnson*, 7 East, 68.

Carr then argued upon the second point, as to the necessity of a new stamp on the memorandum, that the property insured, which was goods and specie to a certain amount, remained the same, as did the voyage and the risks: the only difference between the memorandum and the policy was an extension of the time of sailing from the 1st of *June* to the 1st of *August*; which was no more in effect than an alteration in a warranty or condition of the former policy, that the ship or ships should sail within a given time, which the memorandum dispenses with for two months longer. The statute only requires that the alteration shall be made-before notice of the determination of the risk: and though the memorandum were not made till after the 1st of *June*, yet the risk might well continue long after that time, which was the original limit of the ships' sailing: and certainly no notice was received of its determination when the memorandum was made. 3dly, As to the objection that this is an action brought for the benefit of an alien enemy; if the contract of insurance were lawful at the time of making it, and there be no personal disability in the plaintiff to sue upon it, this case does not fall within any of the cases cited. The object of the licence was the importation of specie from the *Spanish* colonies into our own, which is of great importance to the prosperity of the latter, and has always been favoured by the legislature. The statutes 27 Geo. 3. c. 27, 30 Geo. 3. c. 29, 31 Geo. 3. c. 28. s. 7, 32 Geo. 3. c. 37 and 37 Geo. 3. c. 77, have all relaxed the system of the colonial navigation laws in this and similar respects. In like manner the king has relaxed in favour of this trade his belligerent rights, by granting licences of this description from time to time. And by his general instructions of the 28th of *March* 1798 to the governors of colonies, commanders, and others, he authorizes the carrying on of this trade in *Spanish* ships, and orders them to be received as friends in our colonial ports. The trade is illegal in the subjects of *Spain*, and highly penal in its consequences, and every encouragement and protection on our part is necessary to induce them to engage in it. The king's licence, therefore, is for the benefit of the kingdom. And that he has power to licence the trading with an enemy is recognized in many of the books, and lately by Lord *Kenyon* in *Vandyck v. Whitmore*, 1 East, 475. Then if the trading be legal, it follows that all other contracts incident to such trading, usual and proper for carrying the licence into effect, must be legalized also. The trade is expressly authorized to be carried on in *Spanish* ships; and the *English* owner must therefore contract with the *Spanish* captain for freight. The amount of freight must depend on the expences and risks of the voyage: by so much, therefore, as they may be diminished by insurance, the freight will

be so much less. It was lawful for *Read* to have agreed with *Villas*, in consideration of the latter risking his ship in the voyage for *Read's* benefit, to pay him for it in case of a loss. This would be the same in effect as an insurance of it. And unless *Villas* could have insured his ship, engaged in such a mercantile adventure for the benefit of an *English* subject, and licenced by the king, he would have demanded so much more freight. So it would have been lawful for *Read* to have bought the goods for so much less at the mouth of the port of the *Havannah*, in consequence of taking upon himself the risk of the voyage to *Nassau*. That in substance would be a contract of insurance: and the difference of the price at the *Havannah* and at *Nassau* is the amount of the premium of insurance. The *Spaniard* cannot insure in his own country, because there the trade is illegal; unless, therefore, he can insure here, the *English* subject must pay so much more for the goods as the risk would be valued at, or else the *Spaniard* will not engage in the trade at all. If then the trade must be carried on, if at all, in *Spanish* vessels; for no others can clear out of their harbours; and it cannot be carried on at all without paying the *Spaniard* for the risk of the voyage in some shape or other; the licence to insure the *Spanish* ship is consequential upon the licence to trade, and is in truth most beneficial for the *British* subject. But it would be nugatory to permit the *Spaniard* to insure his ship, if, in case of a loss, the contract of insurance could not be enforced against the underwriter. The cases referred to against the right of action by or in behalf of an alien enemy do not apply; because there the trading was without licence, and therefore illegal in the subject. But here the sovereign, to whom is confided the power of peace and war, has remitted the rights of war in respect of the trading in question, and extended his protection to it. Public writers, Bynck. Quest. Jur. Pub. b. 1. c. 3, on the law of the nations say, that the party licenced is to be considered as if in amity with the sovereign who grants the licence. The plaintiff on the record is a *British* subject, in whom there is no personal disability; and the Court will not take notice of any trust for the purpose of working injustice. If the ship had been taken as prize and libelled in the Admiralty, no doubt the party might have sued there^(a) in consequence of the licence. [Lord *Ellenborough*, C. J. observed, that there were common law authorities to shew that an enemy coming here under a safe conduct might sue in our courts.^(b)]

Marryat in reply said, that in *Wells v. Williams* the distinction was taken between an alien enemy residing in his own country and one residing here under a safe conduct; the latter of whom only could sue in the courts here. That this was an attempt to extend the privileges of the licence beyond what it was meant to convey. It was special in the terms of it, not even to trade generally, but in a particular instance; and still less to sue. That the legality of the contract would not give authority to sue upon it; for however legal or moral it might be at the time it was entered into, yet if the contracting party were of another nation, with which we were afterwards engaged in hostilities, he could not sue here during the war. Indeed, every plea of alien enemy was founded upon an admission of the legality of the contract when made, and objected only to the personal disability of the party to sue.

Cur. adv. vult.

LORD ELLENBOROUGH, C. J. now delivered the judgment of the Court. After stating the record upon which the writ of error was brought, and also the bill of exceptions tendered to the opinion and direction of the Chief Justice delivered upon the trial at *nisi prius*—

The counsel, for the defendant below, the now plaintiff in error, relied upon three exceptions to the opinion of the Chief Justice, as delivered at *nisi prius*: 1st, That the existence of any regular licence authorizing the voyage and

(a) The case of the *Hoop* was referred to, 1 Rob. 201, &c.

(b) Vide *Wells v. Williams*, 1 Salk. 46.

trade in question, which were illegal unless so authorized, was not proved by any competent evidence. That the voyage and trade in question might be so authorized was not disputed. 2dly, That the plaintiffs upon this record could not, in a court of law, enforce by suit a policy for the benefit of a person, who, at the time of effecting the policy, and when the risk attached, and also at the time of the trial, was an alien enemy. 3dly, That the unstamped memorandum of the 11th of June 1800 was not admissible in evidence, as competent to extend the original time of sailing described in the policy, from the 1st of June to the 1st of August 1800.(a) As to the first of these exceptions; there is no doubt that the original existence of the licence in question was competent to be proved in the manner it was, by parol; provided its loss, after due search made for the purpose of finding it, was sufficiently established. The habit of the governor's secretary to destroy or put aside such licences amongst the waste papers of his office, as not being of any further use, was proved; and that he supposed he had dealt with the licence in question in the same manner, though he were not sure he had destroyed it. He recollected an application being made to him for the licence by *Read*, to whom it had been granted, and the fact of his searching for it; but he did not recollect whether upon such search he found it; though he did not think that he found it. We are of opinion that this evidence satisfies what the law requires in respect of search; and establishes with reasonable certainty the fact of the licence being lost.(1)(2) It was not to be expected that the witness should be able to speak with more confident certainty to a fact to which his attention would not be particularly drawn at the time, on account of any importance being supposed to belong to it. As to the non-production of the secretary's memorandum-book, in which he had made entries of licences for his own and the governor's information; that book, if it had existed, and been in the secretary's hands ready to be produced, could not have been produced at the trial in proof of the fact of granting any particular licence; the only use which it could have been allowed to answer being by way of memorandum, to refresh the memory of the secretary who made the entries, when he should be called as a witness. The fact of its loss being proved, so as to let in the secondary evidence of its contents: that matter was sufficiently established by parol. And there is no question made as to the legal competence of such a licence to authorize the voyage and trade in question.

As to the second question, Whether the plaintiffs, upon this record, who are *British* subjects duly competent to sue in their own persons, can in a court of law enforce by suit a policy for the benefit of another person who was an alien enemy when the policy was effected, &c. was so at the trial, and still is so; the negative of this proposition is strongly contended on behalf of the plaintiff in error, on the authority of the cases of *Bristow* and *Towers*, 6 Term Rep. 35, and *Brandon v. Nesbitt*, *ibid.* 23. But it will be recollected, that in those cases the party interested, and on whose behalf the suit was maintained, was an alien enemy, against whose recovery, through the medium of his *British* trustee, there existed this objection, that the property to be cover-

(a) This was the order in which the questions were argued; but in reporting the arguments I have revised the two last for the benefit of the arrangement.

(1) In this country it has been made a question, whether the party may be admitted to swear to the loss? In *North Carolina* the decisions have been in favour of his competency for this purpose. *Blanton v. Miller*, 1 Hayw. 4. *Seckright d. Wright v. Began*, 1 Hayw. 178. n. From *Douglas's lessee v. Saunderson*, 2 Dall. 116, it would seem, that such has been the practice in *Pennsylvania*. But in *Connecticut* the point has recently been decided otherwise by the *Supreme Court*; the loss or destruction of a writing on which the action is founded being considered as a material and traversable fact to be decided by the jury, and to be supported by common law evidence. *Coleman v. Wolcott*, 4 Day, 388.

(2) [See acc. as to proving the loss of a document by a party to the suit, *Snyder v. Woofley*, 8 S. & R. 328. *Meeker v. Jackson*, 3 Y. 442. Also *Donelson v. Taylor*, 8 Pick. 390.—W.]

ed by the policy belonged to an alien enemy, and that any protection afforded to such property, by means of a contract of indemnity, directly and materially contravened the public interest, which was concerned in the precariousness or destruction of such property. In the present instance, no such public policy of the country is contravened by sustaining and giving effect to such a trust: but, on the contrary, this country, in furtherance of the same policy which allows the granting of licences to authorize the trade, ought to give effect to the ordinary means of indemnity, by which that trade (from the continuance of which the public must be supposed to derive a benefit) might be best promoted and secured. And although the king's licence cannot, in point of law, have the effect of removing the personal disability of the trader, in respect of suit, so as to enable him to sue in his own name: it purges the trust, in respect to him, of all those injurious qualities in regard to the public interest, which constituted the particular ground of objection to the trust in the two cases in 6 Term Rep. which have been so much relied upon in argument on the part of the defendant in error. As, therefore, there is in this case no legal incompetence to sue in the parties suing, and no public interest which stands in the way of the maintaining this suit, for the benefit of those who were the objects of the licence authorizing the trade in question, it does not appear to us that the right of the plaintiffs to recover can be well resisted on this ground.

The third objection arose on the unstamped memorandum of the 11th of *June* 1800, which was said not to fall within the proviso contained in the 13th section of the stat. 35 G. 3. c. 63. And this objection was shaped two ways; 1st, that the memorandum was in reality made after notice of the determination of the risk originally insured; and, 2dly, that it introduces a new subject of insurance, or thing not before insured. It was argued that it was after notice of the determination of the risk originally insured, because by the terms of the policy the risk insured was goods shipped on board ships which should sail before the first of June; and this memorandum was not added till the 11th of June; at which time it was notorious that the 1st of June was past; and that, therefore, the risk had determined. But this part of the objection is founded on a misapplication of the term "*determination of the risk insured*;" which means that determination of it which is occasioned by the loss or safe arrival of the thing insured, or by the final end and conclusion of the voyage: and this memorandum is stated by the bill of exceptions to have been written on the policy, (as in fact it must have been) before the loss happened.

The second way of shaping this objection to the memorandum was, that it introduces a new subject of insurance, or thing not before insured; viz. goods on board ships sailing after the 1st of June; the object of insurance being pointed out or marked only by the time of the sailing of the ships on board which the goods should be. To dispose of this part of the objection, it is not necessary to determine, whether the introduction of a new subject of insurance will, under all circumstances, make a new stamp necessary: inasmuch as we are of opinion that in this case no new subject of insurance is introduced by it. The insurance, as it originally stood upon the policy and the memorandum of the 6th of May, was on goods and specie on board of ship or ships, sailing between the 1st of October 1799 and the 1st of June 1800, being the property which should first sail to the amount of 45,000*l.*, and upon the vessels which should carry the goods: which in effect is an insurance on property to a certain extent, ascertained by its priority of sailing, with a limitation as to the time of sailing, and also an insurance upon the vessels carrying it. The essential part of the descriptions is the priority of the sailing, and the amount of the property: for after property to that extent had once sailed, the policy could not attach upon any further property exceeding that sum: and if property to a less extent had sailed, a return of premium in proportion to the property sailing short of the sum insured would of course have been demandable by the assured. The property, which it was the object

of the policy to cover, was as much ascertained by its *voyage*, and by its being *that which should first sail*, as if it had been described by any other circumstance or mark, by which it might have been distinguished from any other thing: and it was as much the same thing as if it had been a specific chattel, capable of appropriate description by its weight, measure, quality, or kind of package: and it would be difficult to shew that an insurance on a thing, the identity of which could be so ascertained, on ship or ships, sailing between the 1st of *October* and the 1st of *June*, was not an insurance on the same thing, if the underwriters should agree by a memorandum to continue insurers on it, if it should sail in any vessel or vessels between the 1st of *October* and the 1st of *August*. The time of sailing would indeed be extended by such agreement, but the object of the insurance would continue the same. So in this case, unless the quantity of property, which to the amount of 45,000*l.* would first sail from the *Havannah* to *Bahama*, and the vessels carrying the same between the 1st of *October* and the 1st of *June*, could be different from that, which might first sail on the same voyage between the 1st of *October* and the 1st of *August*, no new subject of insurance is introduced. If the enlarged time of sailing could make property, which might sail, after property to the amount of 45,000*l.* had sailed, the object of the insurance; that is, if it could make the first last, and the last first, a new subject of insurance would be introduced; but if it cannot, an extension of the time will not operate to make the policy cover a different thing from that which it originally embraced. For if before the first of *June* property to the specified amount had sailed, the extension of the time could have added nothing to that which the policy would have covered as it originally stood. And if property to that amount had not sailed before the first of *June*, the extension of time could only cover with the protection of the policy so much of the original subject of insurance which had not sailed before the first of *June*; viz. so much of the 45,000*l.* which should first sail, but had not sailed before that day. And as the priority of sailing will ascertain the identity of the property, it will equally ascertain the identity of the vessels. For these reasons we think there is no weight in the third objection; and that therefore there must be judgment for the defendants in error, the plaintiffs below.

The like judgment was given in other cases on similar policies, some on ships alone, others on goods alone.

Edmonson v. Edmonson.

8 East, 294. Feb. 12, 1807.

If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 Eliz. c. 6. s. 2, that the damages did not amount to 40*s.*, the plaintiff shall have no more costs; for the *interest or title of the land* does not necessarily come in question in such action, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act.

UPON a question of costs, in this case, which was argued in last *Trinity* term by *Littledale*, against the rule for taxing the plaintiff his full costs; and by *Yates* in support of it;

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was an action upon the case for an injury done to the plaintiff's right of common, by digging turves on the ground where he was entitled to common. At the trial at *Carlisle* before Mr. Baron *Sutton* there was no question respecting the right of common; and the jury found a verdict for the plaintiff, with a penny damages: and the judge has certified under the stat. 43 Eliz. c. 6. s. 2, that the damages to be recovered in such action did not amount to 40*s.* A motion has been made to this Court, that the Master may be

directed to tax costs for the plaintiff, notwithstanding the Judge's certificate; on the ground that the case was not within the statute; *the action being* (as was said) *for a title or interest in lands*; the plaintiff's action resting on his right of common in the land where the injury is complained of, which is a charge on the land. The words of the stat. 43 Eliz. c. 6. s. 2, are these: "If upon any action personal to be brought in any of her majesty's courts at *Westminster, not being for any title or interest of lands*, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the Judges of the same court, and be so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to 40s. or above; that in every such case the Court shall not award to the plaintiff any more costs than the debt so recovered shall amount unto, but less at their discretion." The single question is, Whether this action be for any title or interest of lands? And we think it is not. An action on the case for a disturbance of or injury to the plaintiff's right of common is not *necessarily* an action for any title or interest of lands: it may be brought in order to assert such title, or a right to such interest; or it may be brought against a mere wrong doer, where the plaintiff's title to common is not disputed; or against another commoner, where there is no question on the right of either party; and such was the present case, as reported to us by the Judge who tried the cause. The words of this statute differ from the stat. 22 & 23 Car. 2, which requires a Judge's certificate to entitle the plaintiff to costs, where the damages are under 40s., that the freehold or title of the land was chiefly in question, or that an assault and battery were proved, in all actions of assault, trespass, and other personal actions; which act has been construed to extend only to actions of trespass *quare clausum fregit*, where the freehold or title of land may come in question, and to assault and battery; leaving all other personal actions to the stat. 43 Eliz. And in the case of *Styleman v. Patrick*, 2 Mod. 141, Freem. 214. S. C. as far as it is an authority to be relied upon, the Court appears to have held an action of this description to have been one in which a Judge might have certified under the 43 Eliz., and thereby deprived the plaintiff of his costs, where the damages recovered were under 40s., and the action appeared frivolous to the Judge. We therefore think, that in the present case the rule obtained, for directing the Master to tax the plaintiff his costs must be discharged.

Rule discharged.

IN this Term CHARLES THOMSON, ANTHONY HART, HENRY MARTIN, and JOHN LEACH, Esquires, were appointed His Majesty's Counsel learned in the Law.

CASES

IN

EASTER TERM,

IN THE FORTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

IN and about this Term several alterations took place on the Bench and at the Bar.

LORD ERSKINE resigned the Great Seal, which was delivered for the second time to LORD ELDON.

SIR VICARY GIBBS succeeded SIR ARTHUR PIGGOTT as Attorney-General; and THO. PLOMER, Esq. was appointed Solicitor-General in the place of SIR SAMUEL ROMILLY, and was knighted.

EDWARD MORRIS, Esq. was made a Master in Chancery, in the room of SIR W. W. PEPYS, Bart. who resigned.

THE HONOURABLE SPENCER PERCEVAL, who had filled the office of his Majesty's Attorney-General, was appointed Chancellor of the Exchequer, and Chancellor of the Duchy of Lancaster.

MR. BARON SUTTON was appointed Lord High Chancellor of *Ireland*, and was created a Peer of the United Kingdom by the stile and title of LORD MANNERS of *Foston*, in the county of *Lincoln*.

AND GEORGE WOOD, Esq. succeeded LORD MANNERS as a Baron of the Exchequer, and was thereupon called a Serjeant, and gave rings with this motto: "*Moribus ornes, legibus emendes;*" and in *Trinity* Term following, he was knighted.

Keene, on the Demise of Lord Byron, *v.* Deardon and Others.

The Same *v.* Stott and Others.

The Same *v.* Lomax and Others.

8 East, 298. April 15, 1807.

Though the stat. 16 & 17 Car. 2, provides, that no execution in ejectment shall be stayed, unless the *plaintiff* in the writ of error shall be bound for the costs in case judgment be affirmed, &c. yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail: but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment.

THE lessor of the plaintiff having obtained verdicts and entered up judgments in these ejectments, the defendants brought writs of error; and upon the rules for the allowance, *Marryat* adverted to the words of the stat. 16 & 17 Car. 2. c. 8. s. 3, enacting, "that in writs of error brought upon any judg-

"ment after verdict in any action of ejectione firmæ no execution shall be stayed unless the *plaintiff* or *plaintiffs* in such writ of error *shall be bound* unto the plaintiff in such action of ejectione firmæ in such reasonable sum as the Court to which such writ of error shall be directed shall think fit," &c. conditioned, if the judgment be affirmed, &c. to pay costs, &c. : and then objected that *Deardon* and *Stott*, who were plaintiffs in error respectively in two of the cases, had not joined, nor were present in court and prepared to join, in the recognizances, but only two sureties in each ; which did not satisfy the statute, which requires the plaintiffs themselves to enter into the obligation. But

The Court, after some consideration, agreed that, though the words of the act seemed to require in ejectment a recognizance by the plaintiff in error himself ; yet they must put a reasonable construction upon them ; and as an infant plaintiff could not enter into such recognizance, nor a plaintiff who had become a feme covert after the action brought ; and as the legislature could not have meant to exclude infants and feme coverts from the benefit of the act ; they must put such a construction upon it as would apply to all plaintiffs in error ; and therefore they thought that in reason and substance the act would be satisfied by plaintiffs in error procuring responsible persons to enter into the obligation required. *Wood*, for the plaintiffs in error, on this point referred to 2 Impey's Practice, 706.

It next became a question in what sum the recognizance should be taken ; and upon *Wood* referring to *Thomas v. Goodtitle*, 4 Burr. 2501, it was agreed that the sureties in *Deardon's* case should enter into recognizance for double the improved rent and the single amount of the costs of the ejectment, as they were then calculated at ; (for they had not yet been taxed ;) and accordingly *Deardon's* sureties and *Stott's* sureties justified now in court. But the Court would not permit *Lomax*, the plaintiff in error in one of the ejectments, who was himself prepared in court to enter into the recognizance, to be examined as to his sufficiency ; though the sureties in the other cases were so examined.

Appleby v. Dods.

8 East, 300. April 18, 1807.

Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London* ;" and it was agreed that they shall not demand or be entitled to their wages or any part thereof, until the arrival of the ship at the port of discharge, &c. meaning *London* : held that though the ship earned freight upon the delivery of an outward bound cargo at *Madeira*, and of another cargo taken in at *Madeira* and delivered in the *West Indies* ; yet that being lost in her passage home by a storm, the seamen could not recover wages pro rata upon the outward voyage, by reason of the express terms of the stipulation respecting wages.

IN *assumpsit* for a seaman's wages, it appeared at the trial at the last sittings, at *Guildhall*, that the plaintiff served as a mariner on board a *West India* ship belonging to the defendant, under the usual articles, which stated the ship to be "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London* ;" and in consideration of "the monthly or other wages there mentioned," the seamen severally undertook to "perform the abovementioned voyage : " and the master agreed with and hired them "for the said voyage at such monthly wages, to be paid pursuant to the laws of *Great-Britain* ;" and the seamen bound themselves to do their duty, &c. as seamen "at all places where the ship should put in or anchor during the said ship's voyage ; and not to go out of the same on board any other vessel, or be on shore on any pretence whatsoever, till the voyage was ended, and

the ship discharged of her cargo, without leave, &c. and in default thereof to be liable to the penalties mentioned in the statutes 2 G. 2. c. 36, and 37 G. 3. c. 73. "And it was further agreed that no seaman, &c. *shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the abovementioned port of discharge, and her cargo delivered,*" &c. It was proved that the ship sailed from *Gravesend* on the 11th of *February* 1806, with a full cargo of goods for *Madeira*, which she delivered there in *April*, and there took in a full cargo of wine, part of which she afterwards delivered at *Dominica*; and from thence proceeded to *Kingston* in *Jamaica*, where she delivered other part of the wine, and took in Government stores for *Port Antonio*, another port of *Jamaica*, which were there delivered; and then proceeded to *Martha Bray* in the same island, where she arrived on 28th of *June*, and delivered the remainder of the wine shipped at *Madeira*; and then loaded with sugars, &c. for *London*, and sailed on the 27th of *July*, and was afterwards lost at sea on the 28th of *August*, in the course of her passage home. And thereupon it was contended on the part of the plaintiff, that the voyage being by the terms of it divided into three parts, first to *Madeira*, next to the *West Indies*, and then home; and freight, which is called the Mother of Wages, having been earned in the two first stages of the voyage; he was entitled to recover his wages *pro rata* for so many entire months (the reservation being monthly) as had elapsed between the original inception of the contract and the 27th of *July*, when the ship sailed from *Martha Bray*, her last port of delivery in *Jamaica*. And in aid of this construction it was remarked, that though in the clause restricting the demand for wages "until the arrival of the ship at the abovementioned port of discharge, the word *Port* is there used in the singular number; yet that considering the whole tenor of the agreement, and that in the previous part of it the ship is described to be "bound for the ports of *Madeira*, &c. (in the plural,) and that the voyage was divisible into three distinct parts, so as for the ship to have earned freight on the two first parts, though she were lost on her return home; the word *port*, in the latter part, must be construed *reddendo singula singulis*, as applicable to each port of discharge in the course of the voyage. Lord *Ellenborough*, however, was of opinion that the true construction of the articles founded on the policy of the act of the 37 Geo. 3. c. 73, excluded the plaintiff from recovering wages *pro rata*, inasmuch as the ship never arrived at her port of discharge, which he considered to be *London*; and thereupon nonsuited the plaintiff.

Wigley now moved to set aside the nonsuit, upon the grounds before mentioned; distinguishing this case, where the ship was lost in the last division of the voyage by the perils of the sea, without any default of the mariners, from cases where a mariner wilfully deserts his ship in any stage of the voyage; which it was the peculiar object of the statute 37 Geo. 3. c. 73, to prevent in this trade. And he referred to an anonymous case in 1 *Ld. Ray*. 639; where, in an action for a seaman's wages, Lord *Holt* said that if the ship be lost before the first port of delivery, then the seamen lose all their wages; but if afterwards, then they lose only those from the last port of delivery. But if they run away, although they have been at a port of delivery, they lose all their wages. This probably refers to the same case reported afterwards^(a) as having been ruled by him at the trial at *Guildhall*; which was the case of a ship bound to the *East Indies*, and from thence to return to *England*; which was unladen at a port in the *East Indies*, and took freight to return home, and was captured in the course of the voyage; where he held that the mariners should have their wages for the voyage to the *East Indies* and half the time

(a) 1 *Ld. Ray*. 739, et vide *S. C.* 12 *Mod.* 409, et vide *ib.* 442; and *Hernaman v. Bawden*, 3 *Burr.* 1844, in which latter case no freight was earned in the first part of the voyage; and *Abernethy v. Landale*, *Dougl.* 539, where the ship was captured before her first port of delivery. And vide many other cases on this subject collected in *Cutler v. Powell*, 6 *Term Rep.* 320, and *Chandler v. Grieves*, cited in 2 *H. Blac.* 606.

they staid there to unload. But he relied principally on *Edwards v. C. and Others and the East India Company*, 2 Vern. 727, where the captain of a ship in the Company's service took bonds from the seamen not to demand any wages till the return of the ship to the port of *London*, nor to demand any if she were lost before her return. The ship, after delivering her outward bound cargo in *Bengal*, was captured on her voyage home. And in an action brought by the mariners against the captain, tried before Lord *Holt*, they recovered four months wages which became due at *Bengal*, the first delivering port, notwithstanding the bonds were given in evidence. And the same point was ruled in *Buck v. Rawlinson*, in the House of Lords, 1 Bro. P. C. 102.

LORD ELLENBOROUGH, C. J. The terms of the contract in question are quite clear and reasonable: they relate to a voyage out to *Madeira* and any of the *West India* islands, and to return to *London*: and there is an express stipulation "that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the abovementioned port of discharge," &c.; which must refer to *London*. And though the reason of this stipulation was no doubt, to oblige the mariners to return home with the ship, and not to desert her in the *West Indies*; yet the terms of it are general, and include the present case: and we cannot say, against the express contract of the parties, that the seamen shall recover *pro rata*, although the ship never did reach her port of discharge named. The anxious policy of the legislature to enforce the return home of seamen in their ships from the *West Indies*, in addition to the forfeiture of wages, has also given penalties in case of disobedience to their personal obligations.

LAWRENCE, J. The case before Lord *Holt* was rightly decided upon the general principles of law, arising on the contract, whatever counter remedy there might have been upon the bonds. And the Court of Chancery afterwards, in giving relief to the representatives of the captain, against whom the recovery was had at law, upon a bill filed against the ship owners and the Company, might have considered that there was something unreasonable in the bargain.

Per Curiam,

Rule refused.

Maddock v. Rumball and Another.

8 East, 304. April 18, 1807.

The defendant being indebted to the plaintiff in 486*l.* 4*s.* 6*d.*, for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of November 1803, when the same would have purchased 908*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th of November 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908*l.* 16*s.* 7*d.* stock, with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor within the prohibition of the stock-jobbing act 7 Geo. 2. c. 8.

THE plaintiff declared upon a bond dated the 19th of November 1803, for 972*l.* 9*s.*, conditioned to be void if the defendants or either of them, their heirs, &c. should on or before the 19th of November 1804, purchase and make good 908*l.* 16*s.* 7*d.* 3 per cent. consolidated Bank Annuities, and transfer or cause the same to be transferred into the name of the plaintiff, his executors, &c., for his and their benefit; and also if the defendants, &c. should in the mean time, and until such purchase and transfer of the said 908*l.* 16*s.* 7*d.* 3 per cents, &c. should be made as aforesaid, pay, or cause to be paid to the plaintiff, his executors, &c., all such sums of money as would have become due and payable to the plaintiff, &c., in respect of the dividends, interest, and produce of the said 908*l.* 16*s.* 7*d.* 3 per cents, &c., in case the said 908*l.* 16*s.* 7*d.* 3 per cents had been on the day of the date of the said writing obligatory

standing in the name of the said plaintiff, and had continued to stand in his name until the said 19th of *November* 1804, at such times as such interest and dividends would in that case have become due and payable at the Bank of *England*, without any deduction or abatement thereout: and then assigned for breach that the defendants did not, on or before the 19th of *November* 1804, purchase or make good the sum of 908*l.* 16*s.* 7*d.* 3 per cents, &c. or transfer the same into the plaintiff's name, &c.: and so negatived performance of the terms of the condition.

The plea craved oyer of the bond and of the condition; which latter stated in substance, that whereas the defendant *Rumball* had given his bond, dated 10th of *April*, 1797, to the plaintiff, in the penal sum of 942*l.* 6*s.* 8*d.* conditioned to pay 471*l.* 3*s.* 4*d.* within five years from the 25th of *March* 1797, with interest at 5 per cent. payable quarterly, the first payment to be made on the 24th of June ensuing; and that the principal money was still owing together with 15*l.* 1*s.* 2*d.* for interest, making together 486*l.* 4*s.* 6*d.* And whereas the plaintiff, having brought his action for the debt against *Rumball*, wished to invest the same in the purchase of 3 per cent. stock; and *Rumball*, being then unable to pay the same, had, in order to induce the plaintiff to forbear in his demand and action, agreed at the end of 12 months to discharge the same by transferring so much stock in the 3 per cent. consols, in the name of the plaintiff, his executors, &c. as 486*l.* 4*s.* 6*d.* would at the then present day's price of stock purchase; and in the mean time pay the plaintiff, &c. the interest and dividends which would have become due and payable at the Bank of *England*, upon such stock, in case the same had been at that time standing in the plaintiff's name, and had continued to stand in his name until the expiration of the said 12 months: and for further security for transferring such stock, and paying such interest and dividends in the mean time, had prevailed on the defendant *Andrews* to join him in the bond: and in consequence of such joint security the plaintiff had consented to stay proceedings in the action, and to forbear to recover payment of his principal and interest against *Rumball*, and to accept such stock, and such interest and dividends in the mean time, in lieu of and in satisfaction for his said principal money, and interest due, and to grow thereon. And whereas the average price of stock in the 3 per cent. consols, at the then present day, was 53*l.* 10*s.* for 100*l.* stock, therefore the said sum of 486*l.* 4*s.* 6*d.* would according to that rate purchase 908*l.* 16*s.* 7*d.* 3 per cent. consols. The condition was, &c. (as before set forth in the declaration.) And then the defendants pleaded, 1st, *non est factum*. 2dly, that the writing obligatory was so made, with such condition, upon a corrupt contract for securing the payment, by the means and in the manner in the said condition mentioned, of the said 486*l.* 4*s.* 6*d.* then due and owing from the defendant *Rumball* to the plaintiff, as in the condition mentioned; whereby there was corruptly reserved above the rate of 5 per cent. interest, &c. contrary to the statute, &c. There were other like pleas assigning the usury in a different form, but with reference to the same facts. The replication denied the usury as alleged in the several special pleas.

At the trial before Lord *Ellenborough*, C. J. at the last sittings at *Guildhall*, the facts were proved as stated in the condition; and his lordship having left it to the jury to say whether this were a fair transaction, or a mere colour for usury, they found for the plaintiff. On which

Lawes now moved either for a new trial, or in arrest of judgment; contending that the consideration of the bond as set forth in the condition was usurious upon the face of it, however fairly intended by the parties, as it was evident that more than 5 per cent. interest was received by the plaintiff for the loan of the 486*l.* 4*s.* 6*d.* during the twelvemonth, upon the then price of the stocks.

But all the *Court* agreed that this was not usury; as the amount of the sum to be paid by the defendant depended upon a contingency; and if the stocks

had fallen in the mean time to 50*l*. the plaintiff would have received less than his principal and legal interest would have amounted to. That this was no more usury, than an agreement to replace stock lent; which though once contended to be usury, if more than the principal and legal interest were thereby obtained, had been long settled to be legal.(1) If indeed this had been a mere colour for usury, it would not have availed;(2) but that was negatived by the jury, and nothing appeared to impeach the fairness of the transaction.

Lawes, then contended that this was a transaction within the prohibition of the stock-jobbing act, 7 Geo. 2. c. 8, on which the judgment ought to be arrested: for the plaintiff was not before possessed of any stock, which could be the subject matter of a loan; but it was an agreement for the future transfer of stock in payment of an antecedent money engagement; which differs from the case of *Saunders v. Kentish*,(a) where there was a loan of the stock itself, which it was optional in the borrower to sell out or not, and which might therefore have been returned in specie to the lender.

Per Curiam. This was in effect a loan of stock. The plaintiff would have purchased stock at the price it stood at on the 19th of *November* 1803, if he had received his debt then; but he was content to take his debt in stock, to the same amount at a future day; that is the case with every contract for the replacing of stock. The intention of the parties to a loan of stock is that it should be sold, and the same quantity of stock repurchased at a future period by the borrower.

Rule refused.

Winter v. Brockwell.

8 East, 308. April 18, 1807.

A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure, after it has been executed at the defendant's expence; at least, not without tendering the expences he had been put to; and therefore no action lies as for a private nuisance, in stopping the light and air, &c., and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light.

THIS was an action on the case for a nuisance, wherein the plaintiff complained, that being lawfully possessed of a dwelling-house with the appurtenances in *Long Acre, &c. (Westminster)*, into which the light and air entered by means of a window from a certain open area between the said window and an adjoining house; by means of which open area also noisome smells which came from the adjoining house evaporated, without occasioning any nuisance to the occupier of the plaintiff's house; the defendant wrongfully placed a sky-light over the area above the plaintiff's window, by means of which the light and air were prevented from entering the plaintiff's window into his house, and noisome smells arising from the adjoining house were prevented from evaporating, and entered the plaintiff's dwelling-house, &c. Plea, the general issue. At the trial before Lord *Ellenborough*, C. J. at the last sittings at *Westminster*, the defence set up was, that the area which belonged to the defendant's house had been inclosed and covered by a sky-light in the manner stated, with the express consent and approbation of the plaintiff, obtained before the inclosure was made, who also gave leave to have part of the framework nailed against his wall. But some time after it was finished the plaintiff

(1) Vide *Tate v. Wellings*, 3 Term Rep. 531. *Pike v. Ledwell & al.* 5 Esp. 164. Ord on Usury 46, a. Day's edit.

(2) Vide *Moors v. Battie*, Amb. 371. *Doe d. Davidson v. Barnard*, 1 Esp. 11. *Smedley q. t. v. Roberts*, 2 Campb. 607. *Rose v. Dickson*, 7 Johns. 196.

(a) 8 Term Rep. 162. Vide also *Shepherd v. Johnson*, 2 East, 211.

objected to it, and gave notice to have it removed. But his lordship was of opinion, that the licence given by the plaintiff to erect the sky-light, having been acted upon by the defendant, and the expence incurred, could not be recalled, and the defendant made a wrong-doer; at least, not without putting him in the same situation as before, by offering to pay all the expences which had been incurred in consequence of it: and under this direction the defendant obtained a verdict.

Wigley, (in the absence of the *Attorney General*) now moved for a new trial: but after stating the point, (a)

Lord ELLENBOROUGH, C. J. said, that the *Attorney General*, who led the cause at the trial, had himself mentioned this case at the beginning of the term, in the argument of the case of the Quarries in the isle of *Purbeck*; certainly without intimating any disapprobation of the opinion which had been delivered at the trial, but insisting upon it in support of his argument. His lordship added, that the point was new to him when it occurred at the trial; but he then thought it very unreasonable, that after a party had been led to incur expence in consequence of having obtained a licence from another to do an act, and that the licence had been acted upon, that other should be permitted to recal his licence, and treat the first as a trespasser for having done that very act. That he had afterwards looked into the books upon this point, and found himself justified by the case of *Web v. Paternoster* (best reported in *Palmer* 71, but reported also in other books, *Poph.* 151. 2 *Rol. Rep.* 143. 152, where *Haughton*, J. lays down the rule, that a licence executed is not countermandable; but only when it is executory. And here the licence was executed. (1)

Wigley thereupon waived his motion.

Boot v. Wilson and Another.

8 East, 311. April 21, 1807.

Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar. *Q.* whether a special plea in bar stating no facts but what might have been proved under the general issue, but leaving other facts unanswered which the general plea would have put in issue, be good.

THE plaintiff declared in *assumpsit*; for that whereas on the 26th of *November* 1801, in consideration that the defendants had become and were tenants to the plaintiff of a certain messuage in *Piccadilly*, under a yearly rent of 160*l.*, the defendants promised the plaintiff that they would, during the continuance of the said tenancy, pay the said yearly rent. And then he averred, that the defendants were and continued tenants as aforesaid, &c. from the time of making the said promise hitherto; but that the defendants did not during the continuance of the said tenancy pay the plaintiff the said yearly rent; but on the 29th of *September* 1803, during the continuance of the tenancy, 80*l.* of the rent for half a year preceding was in arrear and unpaid;

(a) A doubt was also suggested, which was stated and overruled at the trial, whether a parol licence, as this was, was good by the statute of frauds, as relating to an interest in land. See *Wood v. Lake*, *Sayer's Rep.* 3, and *Crosby v. Wadsworth*, 6 *East*, 602.

(1) [The decision in the text, is fully corroborated by the authority of the Supreme Court of Pennsylvania, in the case of *McKellip v. McIlhenny*, 4 *W.* 317, where it was held, that a parol license to erect a mill-dam, when once executed, became irrevocable—though before its execution, it might have been revoked. The same principle was laid down in the prior cases, before the same tribunal, of *Strickler v. Todd*, 10 *S. & R.* 74, and *Rerick v. Kern*, 14 *do.* 267. Upon the point of the expiration of a parol license, of a similar character with those existing in the cases just referred to, by mere lapse of time, when not executed by the grantee, see *Gilmore v. Wilbur*, 12 *Pick.* 120.—*W.*]

contrary to their said promise, &c. The second was a general count for use and occupation of the messuage by the defendants, at their request, and by the sufferance and permission of the plaintiff, in consideration of which they promised, &c. The third count was for use and occupation upon a *quantum meruit*. Pleas, 1st, *Non assumpservit*. 2dly, A general plea of bankruptcy of the defendants. 3dly, A special plea of bankruptcy. That while the defendants continued such tenants of the said messuage, &c. and before the suing out of the writ of the plaintiff, viz. on the 1st of *January* 1803, and from thence until the suing out of the commission of bankruptcy afterwards against the defendants, they were traders within the meaning of the several statutes, &c.: and so it went on to state the petitioning creditor's debt; the act of bankruptcy on the 2d of *April* 1803; the petition for and issuing of the commission on the 5th of *May*, before the said rent or money, or any part thereof, became due, on which the defendants were declared bankrupts on the 6th; the commissioners' assignment to *J. S.* and *G. S.* the assignees of the bankrupts on the 21st of *May*, amongst other things, of all the term, estate, and interest of the defendants in the said messuage, to hold to the said assignees from thenceforth for the residue of the term then to come and unexpired of the defendants in the premises; by virtue of which assignment all the term, estate, interest, and term of years then to come and unexpired, property, claim, and demand, of the defendants of and in the said premises became and were vested in *J. S.* and *G. S.* as such assignees, (the said commission still remaining in full force.) And the said *J. S.* and *G. S.* as such assignees, on the day and year last aforesaid, became and were, and from thence until the said rent or money in the declaration mentioned became due and owing to the plaintiff, continued to be possessed of, and used and occupied the said premises, &c. The replication joined issue on the two first pleas, and demurred to the third; assigning for special causes, that it appears by the declaration that the tenancy in the first count mentioned continued until the rent claimed became due; and in the second and third counts, that the defendants are charged in respect of their occupations of the said tenements; the continuance of which tenancy and occupation are not denied in the last plea: and also for that the last plea amounts only to the general issue: and that it is not alleged in that plea that *J. S.* and *G. S.* (the assignees) ever entered into the said tenements by virtue of the supposed assignments; nor is the tenancy of the defendants thereby denied. The defendant joined in demurrer.

Wigley, in support of the demurrer. The declaration states the tenancy and occupation of the defendants to the time of bringing the action; the special plea does not deny that they continued in possession to that time, but only states that their interest in the term was assigned over to the assignees; which will not take away their liability in respect of their possession as tenants; especially as part of the rent accrued before the 5th of *May*, when the commission issued. And though the plea states an occupation of the premises by the assignees from the 21st of *May*; yet that is not inconsistent with the declaration: for there may have been a joint occupation by them and the defendants. At any rate, however, the plea is bad: for either it is no answer in point of law to the action; or if it amount to any thing, it is a denial that the defendants were tenants or occupiers of the premises; and therefore amounting only to the general issue, is bad on demurrer, 10 Rep. 95.

Lord ELLENBOROUGH, C. J. then called on the defendant's counsel to answer the objection, that the plea either denied the occupation of the defendants as tenants, and then it was bad on the demurrer, as amounting only to the general issue; or it did not; and then it was bad, as being no answer in law to the declaration.

Puller, contra, then argued, that the effect of the special plea was to narrow the issue to be tried, making it less than the general issue: though he

admitted that all the facts pleaded might have been given in evidence under the general issue. The plea admitted the occupation by the defendants; but brought before the Court the question of their liability in consequence of their bankruptcy, and the assignment of all their estate and interest in the premises by the commissioners before the rent became due. The reason therefore why a special plea amounting to the general issue is demurable, namely, because it merely tends to lengthen the record, *Warner v. Wainsford*, Hob. 127, without cause, does not apply. The principal question meant to be raised was whether such a plea were not a good answer to an action of *assumpsit* for use and occupation. In *Mills v. Auriol*, 1 H. Black. 433, and 4 Term Rep. 94, indeed, it was holden that the bankruptcy of the tenant was not pleadable in bar to an action of *covenant*, because the covenant was personal. But in *Wadham v. Marlowe* there cited, (a) it was holden to be a bar to *debt* (b) for rent; in lieu of

(a) *M.* 25 Geo. 3. B. R. 1 H. Blac. 437. The following note of the judgment is more full and correct.

Wadham v. Marlowe.

Mich. 25 G. 3, B. R.

Debt does not lie against a bankrupt on the *reddendum* of a lease for rent accruing after the commissioner's assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate.

DEBT on an indenture, whereby the plaintiff leased the premises to the defendant at 75*l.* per annum, payable quarterly. This action was for 112*l.* 10*s.* for one and a half year's rent due at *Christmas* 1782, when the term expired. The defendant pleaded, 1st, *non est factum*; 2dly, as to the 18*l.* 15*s.*, being the rent due for the quarter ending at *Michaelmas* 1781, he pleaded generally, that he became bankrupt on the 15th of *December* 1781, and that the said 18*l.* 15*s.* became due before the bankruptcy. 3dly, As to 93*l.* 15*s.* residue of the said 112*l.* 10*s.*, he pleaded bankruptcy, specially, setting out the trading, petitioning creditor's debt, act of bankruptcy, and assignment by the commissioners to the assignee; by virtue of which the said *C. M.* (the assignee) before the said sum of 93*l.* 15*s.* or any part thereof became due, viz. on the 18th of *December* 1781, entered into the said demised premises, and was possessed thereof, for, and during, and until the expiration of the said term. The plea then stated the other proceedings and the certificate. The plaintiff took issue on the *non est factum*; and on the 2d plea entered a *noli prosequi*, as to the 18*l.* 15*s.*; and demurred generally to the 3d plea. The Court took time to advise; and on the 19th of *November* the following judgment was given.

LORD MANSFIELD, C. J. This case of *Wadham* and *Marlowe* is an action of debt for rent upon a lease for years made by the plaintiff to the defendant. The defendant pleads that he was a trader, and that before the rent became due he committed an act of bankruptcy; that a commission of bankruptcy issued against him, and he was declared a bankrupt; and that the commissioners assigned his effects to *C. M.*, who, before the rent became due, entered on the premises; that the plaintiff had notice of all this; and that the defendant has conformed to the several statutes respecting bankrupts. To this plea there is a general demurrer; and two points have been argued at the bar upon the part of the plaintiff: First, that if there had been no bankruptcy in the case, but the defendant had assigned the lease to a third person, yet he would have been answerable in debt for the rent; unless the plaintiff had accepted rent of the assignee. Secondly, that a commission of bankrupt and an assignment under it, being founded upon an act done by the defendant himself, viz. an act of bankruptcy, should operate only as an assignment made by the defendant; and therefore he is still liable to an action of debt for the rent; the plea not having stated that the plaintiff accepted any rent from the assignee. As to the first point, we do not think that it is necessary there should be an actual acceptance of rent from the assignee by the lessor, to discharge the original lessee from the action of debt, which he is liable to upon the *reddendum* of the lease; but any assent upon the part of the lessor to the assignee would have the same effect. The action of debt is founded, not simply upon the demise, but on the subsequent enjoyment; and it is not necessary in such action to state the deed at all. This point was much discussed and considered in the case of *Warner v. Consett*, 2 Lord Raymond 1500; where it was agreed that *nil debet* was a good plea in an action of debt for rent; because the speciality was only an inducement to the action, and the plaintiff need not set out the indenture. What should be an enjoyment by the lessee is very much a question of law. A lessee cannot by his own act, without the assent of the lessor, destroy the tenancy; and

(b) It appears by the MS. report here stated that the whole rent accrued after the bankruptcy.

which the action of *assumpsit* for use and occupation has been introduced. And if this action lie, the consequence will be, that there must be an apportionment of the rent; for it was determined in *Naish v. Tatlock* and others, 2 H. Blac. 319, that *assumpsit* for use and occupation would not lie against the assignees, to recover any portion of the rent accruing during the bankrupt's occupation.

therefore, until such assent is given, the lessor may avow upon the lessee as his tenant, notwithstanding an assignment has been made, and the assignee is actually in possession of the land. Upon such an avowry evidence of enjoyment by the assignee, though not accepted tenant by the landlord, would be proof of enjoyment by the lessee. For the defendant it was insisted, that notice alone to the landlord of the assignment was sufficient to discharge the lessee from an action of debt. But in our judgment none of the cases cited will warrant this position. In 1 Brownlow 20, and Cro. Jac. 334, acceptance of rent from the assignee, is stated: and in 1 Siderf. 447, (which is a very short incorrect note) it must be understood that there was an assignment, an acceptance of rent, or an assent to the assignment by the lessor. And in 2 Saund. 181, which was an action of debt against an assignee before acceptance, it was held that the lessor might sue either the lessee or his assignee. In the present case, neither acceptance of rent, nor any assent by the landlord to the assignment, is stated in the plea: And therefore if the assignment under the commission has no other effect than an assignment by the lessee himself, we are all of opinion that the defendant will be liable to the rent in this action.

This brings the case to the true question, viz. what is the effect of the assignment under the commission of bankruptcy? Only two cases have been cited applicable to this point: for *Aylett* and *James* in C. B. 22 Geo. 3, is very distinguishable from the present in the pleadings, as well as on the question before the Court. The two cases are *Mayor v. Steward*, in 4 Burrow's Rep. 2439, and *Cantril v. Graham*, Barnes, 69. The case of *Mayor v. Steward* was determined upon a different ground; namely, that the covenant upon which the action was brought was a distinct and independent covenant, and not a covenant which run with the land. But a strong, though an *obiter*, opinion was delivered by Mr. Justice Yates upon this point; who said, that as the commission and the proceedings under it had dispossessed the bankrupt of the whole estate and rendered him absolutely incapable of performing the covenant, it would be a hardship if he should remain still liable to it, when he is disabled by the act of parliament from pursuing it. The Court afterwards adopted that opinion, and said that in a case between lessor and lessee it might have seemed hard to leave the lessee liable to covenants when an act of law had divested him of the emoluments and vested them in his creditors. In *Cantril v. Graham* the Court made that direct determination upon the point in the manuscript note from whence I shall cite it. The case is called *Funtur v. Graham*; and there it is said, that Serjt. Skynner moved that the defendant might be discharged upon common bail. It appeared that the defendant, in 1727, had taken a house by lease from the plaintiff *Funtur* for 9 years, with the usual covenants. After three years he left it, and one *Lukin* lived in it, who paid rent to *Funtur*. That in 1733, the defendant became a bankrupt, and his certificate was allowed and confirmed; and this action was brought against the defendant for the rent of the two last years of the term which had accrued since the allowance of the certificate. The Court said, that by the bankruptcy the lease became vested in the commissioners, and was by them assigned to the assignees; so that from that time the defendant ceased to be tenant of the premises; and therefore he could not be chargeable for the rent incurred afterwards: and the defendant was discharged upon common bail. The counsel for the plaintiff endeavored to impeach the authority of this case, by saying it was only upon a motion to discharge the defendant upon filing common bail; and seemed to suppose that the Court might do that upon account of the hardship of the case, without much regard to what the strict law was. But at that time the Court would not, against a positive affidavit of debt, have discharged the defendant upon common bail, unless they had thought that the law was clearly with him. And it is manifest from the words in which the judgment was given, that it was founded wholly on the strict law of the case, and not upon any circumstances to govern the discretion of the Court. Legal reason is strong with the determination; for the estate is transferred and vested in the assignees by virtue of the acts of parliament, respecting bankrupts: every man's assent is virtually included in an act of parliament, and therefore it is equivalent to an express assent. It was admitted on the part of the plaintiff, that if the estate were divested out of the lessee purely by an act of law without any fault of his, he would be discharged. We think this case must be so considered: for though the commission is founded on an act originally done by the defendant, viz., an act of bankruptcy; yet the commissioners' assignment by virtue of the act of parliament is the actual and immediate cause of divesting the estate out of the bankrupt; and *in jure, non remota sed proxima causa spectatur*. We are, therefore, all of opinion, that there must be judgment for the defendant.

Lord ELLENBOROUGH, C. J. the case of *Wadham v. Marlow* only decided, that the action of *debt* on the *reddendum* would not lie against the lessee, for rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioners' assignment. But in *Mills v. Auriol*, it was determined that the bankrupt lessee, though out of possession, was still liable upon his *covenant* to pay the rent. Then here the plaintiff declares upon an agreement made by the defendant to pay the rent during the continuance of the tenancy; and if bankruptcy cannot be pleaded to an action on his *covenant*, why should it be an answer to this action on the defendant's *agreement* to pay the rent. There is no distinction in this respect between an agreement, and a covenant, which is an agreement under seal, except as to the form of the remedy upon it. The case of *Mills v. Auriol*, to which this is perfectly analogous, did not turn on any particular effect of a covenant under seal, but on its being the personal agreement of the parties. The landlord has nothing to do in this case with the question of apportionment of the rent: for he proceeds against the parties with whom he made the agreement which has been broken.⁽¹⁾ We say nothing therefore of his right to recover against the assignees.

The other Judges concurring:

Judgment for the Plaintiff.^(a)

Battye v. Gresley and five Others.

8 East, 319. April 21, 1807.

1. Under the stat. 1 Jac. 1. c. 15. s. 10, and 11, it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expences of his journey beforehand; though if he be in fact without the means of taking the journey, it may be an excuse for not obeying the summons; and consequently a warrant issued by the commissioners on account of the non-attendance of such witness, without lawful impediment, authorizing his arrest for the purpose of examination, is legal.
2. It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expence of the journey is a lawful impediment.
3. Such warrant for the arrest of the witness, in order to examine him, may issue after his disobedience to the first summons.
4. The propriety of granting the warrant, being an act of discretion, must be determined upon the commissioners acting together at the time. And their order to their officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed; but the mere act of signing the names of the commissioners to the warrant may be done by them separately.

THIS was an action of trespass for assaulting and imprisoning the plaintiff in the *New Bailey* prison at *Manchester* and conveying him imprisoned from *Manchester* to *Leicester*. The defendants pleaded, 1st, not guilty; 2dly, a justification in the general form given by the stat. 1 Ja. 1. c. 15. s. 16, that the act was done under the authority of that statute: to which the plaintiff replied, that the defendants did the act of their own wrong, and without the cause alleged. At the trial at *Lancaster* Summer Assizes 1805, before *Sutton*, B. a verdict was found for the plaintiff for 150*l.* damages, which was afterwards agreed to be made subject to the opinion of this Court on a case stating in substance; that *John Savage*, a trader, became a bankrupt, and a commission, dated the 12th of *January* 1805, duly issued against him, directed to the defendants *Gresley*, *Heyrick*, and *Dalby*, and two other commissioners; giving the usual powers to them, or any four or three of them to execute the same;

(1) Vide *Cottrel v. Hooks*, Doug. 98. *Millen v. Whittenbury*, 1 Campb. 428. *Lansing v. Pendergrast*, 9 Johns. 127. *Frost v. Carter*, 1 Johns. Ca. 73.

(a) Vi. *Bull v. Sibbs*, 8 Term Rep. 327.

under which *Savage* was duly declared a bankrupt. That at the second meeting of the commissioners at *Leicester* on the 5th of *February* 1805, at which the said three defendants named were present; it being stated to them by the bankrupt, on oath, that the plaintiff had in his hands a considerable part of the bankrupt's property; they issued their summons for the plaintiff to attend them at their third meeting, at *Leicester* on the 5th of *March* 1805, to be examined: in which summons (in the usual form) they required every one to whom their warrant was directed personally to appear before them, the major part of the commissioners, on *Tuesday* the 5th of *March* next, at 11 o'clock in the forenoon, at the *Blue Bell Inn* in *Leicester*, to be examined by them, the major part of the said commissioners, by virtue of the commission and the several statutes, &c. (dated) the 5th of *February* 1805. The summons was transmitted by the Solicitor under the commission to Messrs. *Foulkes* and *Higson*, Attorneys at *Manchester*, and was inclosed in the following letter directed to them. "*Leicester* 27th *February* 1805, Gent. On the other side I send "you a summons which you will get copied and served upon Mr. *Battye*, and "return me an affidavit of the service. I do not think it necessary to give Mr. "*Battye* conduct money: we know that he has a valuable balance in his "hands; and the commissioners will decide on his examination how much of "that balance he may deserve to retain," &c. (signed) "*N. Pilkinton*." The summons was served by their clerk on the plaintiff, on the 28th of *February* 1805: but no money was then given or tendered to him to defray his expences. The plaintiff, between the 28th of *February* and the 5th of *March*, called repeatedly on Messrs. *Foulkes* and *Higson*, and expressed great anxiety to attend the commissioners at the intended meeting; but stated that he had no means to defray his travelling expences, and offered to go if they would give him sufficient money to carry him to *Leicester*. But Messrs. *Foulkes* and *Higson* refused to give him any money; saying that their orders were to give him none. On the 5th of *March* 1805, the third meeting of the commissioners was held at *Leicester*, and the said three defendants attended, and waited for the plaintiff till 12 o'clock at night; but he did not attend: whereupon the said defendants, as such commissioners, directed the solicitor under the commission to draw up a warrant to be signed by them, for arresting the plaintiff and bringing him before them at their next meeting, to be held at *Leicester* on the 19th of *April* 1805, to be examined. On the 12th of *March*, Mr. *Pilkinton* received the following letter from the plaintiff, and transmitted the same to Mr. *Gresley* one of the defendants, together with the warrant, which was then unsigned by any of the said three defendants. "*Mr. Pilkinton*, Attorney, "*Leicester*.—I waited last night until the moment of the coach going off for "some money from Mr. *Foulkes*, to whom I explained the necessity of my "presence not only to the benefit of *Savage's* estate, but to clear myself from "any imputation of having acted unjustly on that business: but as I could not "obtain even money to pay my coach fare, I was obliged much against my "will not to obey your summons," &c. signed "*T. Battye, Manchester*, 5th *March* 1805." The warrant, together with the plaintiff's letter, was returned to Mr. *Pilkinton* by Mr. *Gresley*, he having affixed his signature thereto. That the said warrant was signed by the said three defendants at separate places, and not at any meeting held by them as commissioners. The following is a copy of the warrant. "Whereas his Majesty's Commission under the Great Seal of *G. B.* bearing date at *Westminster* the 12th of *January* last past, grounded on the several statutes made and now in force concerning bankrupts, hath been awarded and issued against *John Savage of Manchester*, &c. Hosier, Dealer, and Chapman, directed to us whose names are hereunto subscribed and seals affixed, and to *J. J.* and *M. P.* And whereas we the undersigned *R. Gresley* and *W. Heyrick*, together with the said *M. P.*, being the major part of the commissioners in the said commission named, one whereof is of the quorum, did duly declare the said *John Savage* a bankrupt;

and whereas we the undersigned *R. Gresley, W. Heyrick, and H. Dalby*, did, on the 5th of *February* last past, issue our summons directed to Mr. *T. Battye* of *Manchester* aforesaid, requiring him the said *T. B.* personally to be and appear before us the major part of the said commissioners on *Tuesday* the 5th of this instant *March*, at 11 of the clock in the forenoon of the same day, at the *Blue Bell Inn* in *Leicester*, then and there to be examined by us the major part of the said commissioners, by virtue of the said commission and the several statutes therein mentioned: And whereas good and sufficient proof upon oath was exhibited to us, that our said summons was duly served upon the said *T. Battye*: yet the said *T. Battye* did not come before the major part of the commissioners in the said commission named, at the time and place before mentioned, pursuant to our said summons; but without having any lawful impediment to his coming did wholly make a default, in contempt of the said statutes, and also of the said commissioners, and of the authorities to us given: these are therefore to require and authorize you and every of you, to whom this our warrant is directed, to apprehend and arrest the said *Thomas Battye*, and to bring him the said *T. Battye* before the major part of the said commissioners in the said commission named, at the *Bell Inn* in *Leicester*, on *Friday* the 19th of *April* next, at 10 o'clock in the forenoon of that day, in order to be examined by the major part of the said commissioners in the said commission named, by virtue of the said commission, and according to the intent of the several statutes made and now in force concerning bankrupts: and for your so doing this shall be your sufficient warrant. Given under our hands and seals this 6th day of *March* 1805, *R. Gresley, W. Heyrick, H. Dalby*, (directed.) To *James Staple* our messenger, and to his assistant, and to all mayors, bailiffs, constables, head-boroughs, and all other his majesty's loving subjects, whom we require to be aiding and assisting in the execution of this our warrant as occasion shall require." The warrant was delivered to the defendant *Staples*, the messenger to the said commissioners, to be executed: and he, by virtue thereof, with the aid of the other two defendants, *Nadin* and *Taylor*, who are police officers at *Manchester*, on the 17th of *April* 1805, arrested the plaintiff at *Manchester*, and brought him in custody before the said commissioners at their next meeting at *Leicester*: at which meeting the plaintiff was examined before the said commissioners, and discharged; and his expences allowed him. The question was whether the plaintiff were entitled to recover?

Littledale, for the plaintiff, contended that the summons was inoperative for want of a tender to the plaintiff of the reasonable expences of his journey, and that he was not bound to go, without such tender; by analogy to the case of a witness subpoenaed to attend a trial, against whom the Court will not grant an attachment for disobedience of it, if there were no tender of the witness's expences of attending the trial. (a) [*Lawrence, J.* intimated that the necessity of a previous tender of the expences in that case was derived from the particular wording of the stat. 5 Eliz. c. 9. (b)] The stat. 1 Jac. 1. c. 15. (c)

(a) Vide 2 Tid's Practice 721, ch. 35.

(b) The 12th sect. provides "that if any person upon whom process, &c. shall be served to testify or depose concerning any cause, &c. and having tendered unto him, according to his countenance or calling, such reasonable sums of money for his costs and charges, as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and reasonable let or impediment to the contrary; that then the party making default to lose 10l." &c.

(c) 8. 10, reciting that by the stat. 13 Eliz. c. 7, the commissioners have power to send for such persons as the creditors suspect to detain any of the bankrupt's property, to be examined by the commissioners, but have not good remedy to compel their appearance or examination; enacts, that if any, supposed to have any part of the goods, &c. of the bankrupt, "shall after lawful warning to the said person given to come before the said commissioners, &c. to be examined, &c. refuse to come, &c. having no lawful impediment, such as shall be admitted and allowed of by the said commissioners, and which

which gives authority to the commissioners of bankrupts to summon witnesses, to be examined concerning the bankrupt's estate, also directs that the witnesses shall have their costs and charges: and though silent as to the time, yet the act ought to have a reasonable construction. And in *Dyer v. Missing*, 2 Blac. Rep. 1035, which was an action of trespass and false imprisonment against commissioners of bankrupt for an arrest of the plaintiff under their warrant issued for a similar purpose, the special plea alleged a tender of his expences to the witness at the time of the summons.

Per Curiam. Nothing turned upon the tender in that case. The objection there was, that the commissioners by their warrant committed the witness to prison, without first bringing him before them to be examined, as the act directs them to do. If when brought before them he refuses to be examined, then and not before, they may commit him. But there is nothing in the act of Jac. 1, which requires the expences to be tendered before hand to the witness at the time of the summons; as in the statute 5 Elizabeth, c. 9. Such tender is not made a condition precedent to the issuing of the warrant.

2dly, It was objected that, if the want of such tender did not make the issuing of the warrant illegal, at least it was a sufficient excuse to the party for not obeying the summons. He might not have had money enough to carry him.

Per Curiam. If he had had no money to convey himself to *Leicester*, that might have been a *lawful impediment*, within the statute; but it lay upon the plaintiff to shew an excuse for his non attendance. Nothing, however, of that sort appears in the case; it is only stated that *he said* that he had no means of defraying his travelling expences: but it is not stated as a fact that he had none.

3dly, It was objected that there ought to have been a second summons to the plaintiff before the issuing of the warrant. The meaning of the 10th sect. is not very distinct in this respect: the words are, that if any person, *after lawful warning* to come before the commissioners to be examined refuse to come, &c. having no lawful impediment, &c. to be allowed of by the commissioners at the time of their assembly; or that any such person, having knowledge or *warning* of any *other* assembly, shall not appear before them at such time, &c. then it may be lawful for the commissioners to commit him. If the word *or* be there taken in the disjunctive, the provision seems to be, that if the party do not attend on the first summons, and being warned to attend *another* meeting of the commissioners, neglect that also, having no lawful impediment; then the commissioners may issue their warrant to commit him for not attending the *first* summons; which is not very intelligible. But if *or* be read *and*; then a second summons would be necessary before a commitment. The general practice has been to issue a second summons, upon the neglect of the first, before the warrant of commitment: and that is countenanced by the report of the case of *Dyer v. Missing*.

Per Curiam. The practice has arisen *ex abundanti cautela*; but the act does not require a second summons. It is in the disjunctive. The first branch is complete; and the next may well be taken to mean, that if a party, after having once before been summoned, and appearing, or having lawful impediment for not appearing, be summoned again and do not appear, &c., having no lawful impediment, he may be committed; as well as if he neglect to appear on the first summons, having no lawful impediment.

"shall be then signified or made known to the said commissioners at the time of their assembly, &c.; then it shall be lawful for the said commissioners, &c. to direct their warrants to such persons as to them shall be thought meet, to arrest such person as shall refuse to come, &c. and to bring him before the said commissioners to be examined, &c. and upon his refusal to come, or to be examined, to commit him to prison, &c. until he shall submit himself, &c." Then s. 11, provides "that such witnesses as shall be so sent for shall have such costs and charges as the commissioners in their discretion shall think fit."

4thly, It was objected, that the granting of the warrant of commitment is a judicial act, and that the warrant ought therefore to have been signed by the commissioners when together, and not at different times and places: for they are to judge whether the party had a sufficient excuse; and also to whom the warrant is to be directed: and merely stating, that the commissioners when together directed the solicitor to draw up the warrant to be signed by them, is not sufficient. For even if that were to be taken as an exercise of their joint judgment as to the propriety of issuing the warrant, it does not appear that they exercised any discretion as to the person or persons to whom the warrant was to be directed.

Lord ELLENBOROUGH, C. J. The commissioners, I admit, ought to hold counsel together, (a) and agree upon the substance of the warrant, whether or not it shall issue for the arrest of the party; but here I consider that they had exercised together every material act of judgment, including the direction of the warrant. We must consider, that in directing the warrant to be made out, they gave their officer every necessary direction for that purpose, including the persons' names to whom the warrant was to be directed: so that when it came before them for their signatures, nothing else should remain to be done except the mere act of signing it: and this need not be done together. Suppose each, immediately after writing his name, had left the room where they were assembled in the first instance: would that have avoided the warrant? Then why not sign it alone in any other place?

The other Judges concurring,

Judgment of nonsuit to be entered.

Richardson was to have argued for the defendants.

Shadgett v. Clipson.

8 East, 323. April 21, 1807.

The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a *latitat* issued against *C. B.*, and averring that it was issued against *A. B.* by the name of *C. B.*, and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.*

TRESPASS for assaulting and imprisoning the plaintiff. Plea, that before the time when, &c. viz. on the 25th of June, 46 Geo. 3, one *D. Allen* sued out a writ of *latitat* against the plaintiff Josiah Cordeux Shadgett, therein called by the name of John Shadgett, directed to the sheriff of London, &c.; and so it set out the writ, authorising the sheriff to arrest John Shadgett: which was indorsed for bail in 10*l.*; and averred the delivery of it to the sheriff, who thereupon before the return made his warrant under seal, &c. directed to the defendant Clipson and another, serjeants at mace, and thereby commanded them to take the said Josiah Cordeux, therein called by the name of John Shadgett, to answer the said *D. Allen* in the plea, &c.; which said warrant was delivered to Clipson to be executed, who before the return of the writ arrested the said Josiah Cordeux to answer, &c., which were the trespasses complained of, &c. And then it concluded with an averment that the said

(a) All acts of judgment required of two or more persons must be done together; as to examine witnesses to ground an order of removal; *Rez v. The Inhabitants of Coln, St. Aldwin's Burr.* 5 C. 136; To ground an order of bastardy; *Billings v. Prinn and Another*, 2 Blac. Rep. 1017. In *The King v. Forrest and Others*, 3 Term Rep. 39, though it was stated that the magistrates did not sign the appointment of overseers of the poor together, yet the other facts of the case and the judgment of the Court shewed that the substantial objection was not that they were not together when the mere act of signing was done; but that they did not deliberate and concur together upon the propriety of the appointment. And such was the nature of the objection in *Rez v. The Inhabitants of Great Marlow*, 2 East, 244.

Josiah Cordeux Shadgett and *John Shadgett* in the said writ and warrant mentioned are *one and the same person*, and not other or different. To this there was a general demurrer, and joinder.

Wigley, in support of the plea, said, that the demurrer was joined in this case before the determination of the Court in *Dixie v. Scholey*(a) in the last term; which he admitted to be directly in point against him. That the only other case upon the subject was *Cole v. Hindson*, 6 Term Rep. 234; but that was a case of process against the goods of the party by a wrong name.

LORD ELLENBOROUGH, C. J. This case is exactly the same as *Dixie v. Scholey* last term; and that was exactly the same in principle as *Cole v. Hindson*. And there was the same averment in both, that the process issued against the same person so misdescribed. Process ought regularly to describe the party against whom it is meant to be issued: and the arrest of one person cannot be justified under a writ sued out against another.

LAWRENCE, J. In *Cole v. Hindson* Lord *Kenyon* observed, that there was no averment that the plaintiff was known as well by the one name as the other: neither is there any such averment in this case.(1)

Per Curiam,

Judgment for the Plaintiff.

Fisher, Executrix of Toten, v. Mowbray.

8 East, 330. April 21, 1807.

An infant can on no account bind himself in a bond with a penalty conditioned for payment of *interest* as well as principal.

TO debt on bond to the testator for 30*l.*, the defendant pleaded infancy; and the plaintiff replied the condition of the bond; whereby, after reciting that *Toten* had paid 14*l.* to the churchwarden of the parish of *St. Botolph, Aldersgate*, in consideration of his taking charge of an infant begotten by the defendant, the condition was, that if the defendant should pay to the testator, his executors, &c. 14*l.* and *interest thereof* at the rate of 5*l.* per cent., and 5*s.* for the stamp of the bond, it was to be void, &c.: he then pleaded, that the bond was so made by the defendant to *Toten* for securing payment of the 14*l.* advanced by *Toten*, and paid and expended by him for the use of the defendant at his request; the same being paid *necessarily* and for the use and benefit of the defendant, and for securing the payment of *interest* on the 14*l.* at the rate of 5*l.* per cent. &c.: and then alleged a breach in non-payment of the principal and interest, and the 5*s.* for the stamp. To this there was a general demurrer, and joinder.

When this case was called on, Lord *Ellenborough*, C. J. asked *Clayton* Serjt., who was to support the replication, whether he had any authority to shew, that a bond given by an infant, *bearing interest*, could be sustained: besides other difficulties in the case which he had to contend with. To which

Clayton, Serjt., answered, that the whole current of authorities shewed that an infant might bind himself by single bill for necessities:(b) and that since the construction put upon the stat. 8 & 9 W. 3. c. 11, in *Roles v. Roleswell*, 5 Term Rep. 538, and *Walcot v. Goulding*, 8 Term Rep. 126, every bond with a penalty is no more than a single bill; and therefore an infant cannot be

(a) I was not in Court when that case was decided; but the plea was in the same form as this: and the Court, I was informed, were clearly of opinion that it was no answer to the action, when brought immediately on the execution of the first process; whatever it might be after an opportunity of pleading in abatement had been suffered to go by, without insisting on the misnomer.

(1) Vide *Wilks v. Lorck*, 2 Taun. 400. *Scandover v. Warne*, 2 Campb. 270. Vide etiam *Delaney v. Cannon*, 10 East, 328. *Dring v. Dickenson*, 11 East, 225.

(b) Vide *Russell v. Lee*, 1 Lev. 86.

prejudiced by the form of the security. And if he were not liable at all for the payment of interest, that would not avoid the security altogether, but only go to the quantum of damages.

Lord ELLENBOROUGH, C. J. Even if there were any foundation, as is ingeniously contended, for saying that, since the stat. of William, the bond is a penalty with a condition is in effect a single bill, and could be available against an infant upon the account here disclosed: still this goes beyond all the authorities in charging the infant with interest. And this objection goes, not merely to the quantum of damages, but to avoid the whole security; for the judgment must be for the sum due upon the bond, and part of that sum is due for interest, for which an infant cannot give a security.

Per Curiam, Judgment for the Defendant. (a)
Burrough was to have argued for the Defendant.

The King v. The Inhabitants of St. Margaret, Leicester.

8 East, 332. April 22, 1807.

Where one of two churchwardens was also appointed overseer of the poor, a certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate act 8 & 9 W. 3. c. 30, requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time.

TWO justices by their order removed *Sarah* the wife of *David Billson*, and *Thomas* her infant son, from *St. Margaret's* to *Keyham* in the county of *Leicester*. The sessions, on appeal, quashed the order, subject to the opinion of this Court on the following case. It was proved that the derivative settlement of *D. Billson* was at *Keyham*. And the appellants then proved an indenture of apprenticeship by which *D. Billson* was bound to one *J. Hallam*, of *Ossington* parish in *Nottinghamshire*; under which *Billson* served more than 40 days in *Ossington*. The respondents, to set aside this settlement, produced the following certificate granted to *Ossington* parish:—*Nottinghamshire*, to wit. We, *John Redfern* and *Stephen Sharpe*, churchwardens and overseers of the poor of the parish of *Gotham* in the county of *Nottingham*, do hereby own and acknowledge *J. Hallam* and *Elizabeth* his wife to be our inhabitants legally settled in the parish of *Gotham* in the county of *Nottingham* aforesaid, &c. (concluding in the usual form,) dated the 26th of June 1775; and directed to the churchwardens and overseers of the poor of the parish of *Ossington* in the county of *Nottingham*; and it was signed and sealed by *John Redfern* and *Stephen Sharpe*, and allowed by two justices of the peace, in the usual form. It was proved that *Stephen Sharpe* and *John Redfern* were appointed the two churchwardens for *Gotham* parish for the year 1775, and that the said *Stephen Sharpe* was also appointed the sole overseer in the same year. The question reserved by the Sessions was, Whether the certificate were valid?

Rough (with whom was *Darell*), in support of the order of Sessions, was stopped by the Court, who referred to *Rez v. Clifton*, 2 East, 168, as having in effect decided this question.

Vaughan, Serjt. (*Balguy*, *Gurney*, and *Beauclerk* were with him) contra,

(a) Vide Co. Lit. 172, a. A bill is commonly taken for a single bond without any condition. An infant may bind himself to pay for necessaries, &c. but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him. And in *Trueman v. Hurst*, 1 Term Rep. 40, it was held that *assumpsit* on an account stated would not lie against an infant. [Vide *Williamson v. Wattle*, 1 Campb. 552, and the reporter's note thereto, p. 553.]

admitted that that case pressed against him; but observed that it was the case of an appointment of a single overseer for a township; and he alone granted the certificate, though there were two churchwardens for the parish at large: whereas here both the parish officers concurred: and the stat. 43 Eliz. c. 2, constitutes the churchwardens to be overseers. But finding the Court decidedly against them, he and the other counsel acquiesced.

LORD ELLENBOROUGH, C. J. The words of the stat. 43 Eliz. c. 2, are that the churchwardens of every parish, and four, three, or two substantial householders there shall be called *overseers* of the poor, and are to take charge of them. Then the certificate act, 8 & 9 W. 3. c. 30, requires that a certificate shall be granted under the hands and seals of the churchwardens *and* overseers of the parish, or the *major* part of *them*: how then can we say, that that which is directed to be done by two overseers at least, joined to the churchwardens, or the major part of them, can be done by one overseer and one churchwarden only; or by two churchwardens, one of whom acted in the double character of churchwarden and overseer?

LAWRENCE, J. The statute of King William, which must govern us in this question, has expressly given the power of granting certificates to the churchwardens and overseers jointly, or the major part of them: and in case there be no churchwardens it gives the same power to the overseers alone, of whom there must at least be two: but in no event does it give this authority to the churchwardens without the overseers.

Per Curiam,

Order of Sessions confirmed. (1)

Daniel v. Dodd.

8 East, 334. April 22, 1807.

A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution, cannot be held to bail again upon bills of exchange given by him, before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills.

THE defendant was arrested for a debt at the suit of the plaintiff, and held to special bail; and after a verdict for the plaintiff in *June* 1803, he agreed to accept from the defendant three bills of exchange as a collateral security for the damages and costs; and it was agreed that execution should not issue until default made in payment of the bills. In *Michaelmas* term 1803, after the bills had been accepted, the defendant's bail rendered him in their discharge to the warden of the *Fleet*. On the 14th of *February* 1804, the defendant was superseded for want of being charged in execution; and upon the 23d of *February* last, he was arrested upon the two bills. And thereupon

Comyn moved, on a former day, that the defendant might be discharged on filing common bail; and cited *Hall v. Howes*, 2 Stra. 1039, and *Taylor v. Wasteneys*, ib. 1218: in the latter of which the defendant was arrested for 25*l.* and lay in gaol till he was superseded; after which he gave the plaintiff a note for 20*l.*, who held him to bail in a fresh action upon it: but the Court discharged him on common bail; saying, that it was but a further security, and did not extinguish the former cause of action. And he also referred to *Chambers v. Robinson*, 2 Stra. 782; *Crutchfield v. Seyward*, 2 Wils. 93, and *Blandford v. Foot*, Cowp. 73.

Reader now shewed cause, and relied upon *Collins v. Powell*, 2 Term Rep. 756, where a cause in which the defendant had been holden to bail having been referred to arbitration, and the arbitrator having awarded above 10*l.* to the plaintiff, the defendant was again held to bail in an action on the award;

(1) Vide *The King v. The Inhabitants of Hinckley*, 12 East, 361.

the Court saying, that it was an entire new cause of action; and distinguishing it from the common case of an action on a judgment.

LORD ELLENBOROUGH, C. J. said, that the award in that case might have been pleaded in bar of the original cause of action; but here the giving the bills could not have been so pleaded in bar: they did not give a *new* so much as an *alternative* cause of action: they were nothing more than a further security for the same cause of action, according to the case in *Strange*, which is strongly in point; and gives a rule which is best calculated to prevent oppression.

Per Curiam,

Rule absolute.

Gray v. Cook.

8 East, 336. April 23, 1907.

A market gardener who rented a stand with a shed over it in *Fleet-market*, at an annual rent; which he occupied three times a week on market days till 10 o'clock in the morning; after which, and on all other days, it was occupied by others: does not keep a stand within the meaning of the *London* Court of Requests act 39 & 40 Geo. 3. c. 104, so as to be privileged to be sued there for a debt under 5*l*.

THE plaintiff having recovered less than 5*l*. in an action brought in this Court against the defendant, a market gardener, living at *Bermondsey* in *Surry*, the latter obtained a rule nisi in *Hilary* term last for entering a suggestion upon the roll under the statutes 3 Jac. 1. c. 15, and 39 and 40 G. 3. c. 104, (local acts,) that the original cause of action did not exceed 5*l*., and that the same was recoverable in the *London* Court of Requests: which application was grounded on an affidavit of the defendant's occupation of certain market stands (as they are usually called) in *Fleet-market*, which he held under the corporation of *London* at an annual rent. It appeared, however, upon shewing cause in the same term that these stands were only used by the defendant on market days, three times a week, till a certain hour in the morning; and that after that hour on those days, and at all times on other days, these stands were open to other persons: but it not distinctly appearing what description of stands these were, and how occupied, the Court directed the case to stand over till this term for a further affidavit of these facts: expressing their clear opinion to be, that if the party had no permanent occupation of the stand, but that it was occupied at other times by other persons; this was not such a "*keeping* of a stand" as was within the meaning of the act of parliament. It now appeared by an additional affidavit that the defendant rented six garden stands in *Fleet-market* from the corporation of *London*, under an agreement with the clerk of the market, at an annual rent, with a stipulation for three months' notice to quit on either side. That these stands are about six feet square, with a roof over them, but open at the sides, and the goods are pitched on the ground. That the market days for green grocery are three times a week, during the season; and the defendant on those days occupies the stands till about ten o'clock in the morning, at which time all carts and waggons are directed to be cleared away: and after that time the stands are occupied by other persons, as they are on other days of the week than the green market days. It also appeared that the plaintiff knew of the defendant's keeping these stands in this manner before the action was brought.

The *Attorney-General* and *Gurney* shewed cause against the rule; and *Marryat* was heard in support of it.

LORD ELLENBOROUGH, C. J. The act of the 39 and 40 Geo. 3, goes far enough as it is, and we must not carry it to a more extravagant length by construction. Having begun with providing for the fair and obvious cases of debtors inhabiting and residing within the city, it contemplated also the case

of those who were substantially carrying on their business there in the day-time, though they might sleep elsewhere at night. It therefore extended the privilege of being sued in the Court of Requests to those who kept even stands and sheds for the sale of their goods all the day long; where those who had business to transact with, or demands to make upon, them might know where to find them at all reasonable hours. But this defendant does not keep a stand for the whole day. After 10 o'clock in the morning he is no longer to be found there; but others occupy his place. I do not object to this keeping, as of a *shed*, but to the *keeping* itself. He has too short an enjoyment of the stand to come within the fair meaning of the statute as one *keeping* a stand. It meant to include only persons virtually domiciled there during the day; though not having the convenience of sleeping there. It would be giving a dangerous latitude of interpretation to the act, if such a case as this were held to be within it.

GROSE, J. This is not a *keeping* of a stand within the act; the meaning of which was to avoid unnecessary expence and vexation, by obliging creditors who sued for small sums to bring their actions within the local jurisdiction where the defendants resided or generally carried on their business. As in the instance of cobblers, who have their regular stands in the town where they work all day at their employment, though they sleep elsewhere at night. But that does not apply to the situation of the defendant.

LAWRENCE, J. The construction of the act contended for would be very inconvenient for debtors themselves; for they may be warned to appear to the suit by leaving the notice or summons at the stand which they keep; but a defendant would have but little chance of seeing a notice left at such a stand as this is described to be; which is occupied the greater part of every market day, and the whole of every other day, by other persons.

LE BLANC, J. The *keeping* mentioned in the statute must mean at least such a permanent keeping as the nature of the stand, or other subject matter, will reasonably admit of; and can never apply to the case of a man who is away from the stand the greater part of the week, and the greater part of any day in the week.(1)

Rule discharged.

West and Another, Executors of Moore, v. Moore.

8 East, 339. April 24, 1807.

The deviser having devised certain estates to *A.* in fee; and to his executors "all his money," &c. *stock upon his farm*, with the implements of husbandry, and *all other his personal estate* of what nature or kind soever, in trust to pay debts and legacies, &c.: held that the devise of the *stock upon his farm* carried the standing crops of corn growing there at the time of his death from the devisee of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid.

THE plaintiffs brought an action for money had and received by the defendant to their use as executors, in order to try their title to standing corn growing on the testator's premises at the time of his death, claimed by them under the will of the testator, against the defendant the devisee of the real estate. The plaintiffs were non-suited at the trial before *Le Blanc*, J. at the last summer assizes at *Worcester*, subject to the opinion of the Court on this case. The testator, *James Moore*, by his will dated the 28th of *March* 1801, after devising several estates to the defendant in tail, devised as follows: "Also I give and devise unto my said cousin *Edward Moore* aforesaid (the defendant) all those my several estates situate in the parishes of *Great Shelsley* and *Martley* in the county of *Worcester*, and now in my own occupa-

(1) Vide *Holden v. Newman*, 13 East, 611. *Skinner v. Davis*, 2 Taun. 196.

tion, and in the occupations of my respective tenants *J. B., E. S., and J. M.*: "to hold to him, his heirs and assigns for ever." The testator then devised several other estates to different persons: and after devising to the plaintiffs (naming them as his executors) certain freehold estates therein described, and all other his freehold, leasehold, or copyhold estates not thereinbefore disposed of, in trust to sell, and apply the monies arising from such sale in the discharge of his debts, funeral expences, and legacies; he proceeded as follows: "And also I give and bequeath unto my said executors all my monies, and securities for money, household goods, furniture, plate, china, linen, and stock upon my farm, with the implements of husbandry, and all other my personal estate of what nature or kind soever, or whatsoever; in trust, to sell and dispose of the same, and to apply the monies arising therefrom to the payment of my just debts, funeral expences, and the expences of proving and executing this my will, and also in the discharge of the respective legacies hereinafter by me given and bequeathed." The testator then gave several legacies, and added, "And my mind and will is, that the after-mentioned legacies shall be paid, as soon after my decease as my executors can with propriety sell, dispose of, and convert into money, the real and personal estates left to them in trust for that purpose. And in case the monies arising from the sale of my said estates, left in trust to be sold as aforesaid, shall amount to more than will pay my just debts and legacies, then I give the surplus or residuum unto my executors hereinafter named, to pay and apply the same unto such person or persons as I shall hereafter appoint under my hand and seal, duly executed, by way of codicil to this my will." The testator died the 27th July 1806, seised in fee of the several estates devised by him, and not having made any codicil to his will, or otherwise altered it. Immediately upon his death the defendant entered into possession of the several estates at *Great Shelsley* and *Martley* so devised to him. At which time there were growing upon the lands in *Great Shelsley* several crops of wheat, oats, beans, and peas, which were shortly afterwards cut and sold by him, and 231*l.* 17*s.* received by him for the same. Exclusive of that sum, there was a considerable surplus of the testator's personality, after payment of all his debts and legacies, without selling any of the real estates devised in trust to be sold to pay debts and legacies. If the Court were of opinion that the plaintiffs were entitled to recover the value of the standing crops, then a verdict was to be entered for the plaintiffs for the said sum of 231*l.* 17*s.* But if the Court were of opinion that the standing crops passed to the devisee of the land, then the nonsuit was to remain.

Puller, for the plaintiffs, said, that it was clear that as between the executor and the heir, if there were no devisee of the land, the executor would be entitled to the standing crops of corn, Co. Lit. 55. b. and 3 Atk. 16, (which was not disputed: and Lord *Ellenborough*, C. J. referred to Gilb. L. of Evid. 214, 15, as collecting the authorities, and giving the best explanation of the distinction.) The only reason why standing crops shall pass from an executor to the devisee of the land, as was held in *Spencer's* case, Winch. 51, is upon the presumption that it was the will of the testator that he who takes the land should take the crops which belong to it: because, as it is said in *Gilbert's L. of Evidence*, 214, every man's donation should be taken most strongly against himself. But the rule being founded in presumption, that may be rebutted as in other cases by any thing in the will which shews that the deviser meant that the executors should have the crops. And here the devise of the land to the devisee is in general terms: but to the executors he devises by express words, the stock on his farm, and all other his personal estate of what nature or kind soever. The mere devise of all his personality by express words to his executors would have rebutted the presumption arising from the general devise of the land: but when coupled with the devise to them of the stock on his farm, the case is stronger. Again, the devise to the

executors is for the payment of debts, and therefore should have the largest interpretation to increase the fund : and the ultimate sufficiency of the fund, without this aid, will not vary the construction of the words. He relied on the case of *Cox v. Goodsall*,^(a) before Lord *Holt*, as in point to shew that a devise by one of *the stock of his farm* to his executrix would carry the standing crops to her from the devisees of the land. And this is adopted in Bull. N. P. 34.

Wigley, contra, endeavoured, to distinguish this from *Cox v. Goodsall* : because there the devise of the stock of the farm was not to the devisor's mother, as executrix, but it was expressly given to her beneficially for her life, as a devisee, and not subject to the control of his other executor, during her life : she therefore stood in the most favoured situation of a devisee : but here the personal estate which the executors take is immediately chargeable with the payment of debts, &c. The case of *Cox v. Goodsall* admits the general rule, but proceeds on the idea that the standing crops there were expressly devised away from the devisees of the land, by the devise to the mother of the stock of his farms. But that is a strained construction of those words, which are usually taken to mean moveable stock only. Standing corn is not seizable under a *feri facias*, but only under a *levari facias* : it was not distrainable at common law, but is made so by statute.

LORD ELLENBOROUGH, C. J. The case of *Cox v. Goodsall* before Lord *Holt* is in terms so much the same as this, that it must conclude it : though but for that case I should have been more inclined to think that *stock on the farm* meant moveable stock. The distinction between the heir and devisee of the land in this respect is capricious enough. In the testator himself the standing corn, though part of the realty, subsists for some purposes as a chattel interest, which goes on his death to his executors as against the heir : though as against the executors it goes to the devisee of the land, who is in the place of the heir. This is founded upon a presumed intention of the devisor in favour of his devisee. But this again may be rebutted by words which shew an intent that the executor shall have it. So the matter stands upon the authorities. The only difference between the case before Lord *Holt* and the present is, that there the mother, to whom the standing corn was conveyed by the devise of the stock on his farm, was not the sole executor ; but if she did not by her will make a disposition for the payment of certain sums which he bequeathed, it was to go to his other executor for the same purpose : there is therefore no material distinction between the cases : and a construction having been once put upon these words, the question is now concluded.

The other Judges concurring,

A verdict was entered for the plaintiffs for 231l. 17s.

Braddick v. Thompson.

8 East, 344. April 23, 1807.

Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award : but is only matter for application to the equitable jurisdiction of the Court to set aside the award. Neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action.

TO debt on bond, the defendant craved oyer of the bond and condition ; which latter, reciting that differences had arisen and were depending between the plaintiff and the defendant and other underwriters on certain policies of

^(a) Before *Holt*, C. J. 11 W. 3, cited from Lord *Holt's* MS. in *Crosby v. Wadsworth*, 6 East, 604, note.

insurance on ships and freight, in which the plaintiff was interested, and that they had agreed to refer the same to the arbitration of *J. K.* and *R. H.*; was, that the bond should be void if the defendant and the other underwriters did abide by and perform the award: the submission to which was made a rule of Court: and then he pleaded, 1st, *non est factum*. 2dly, that the arbitrators made *no award*. 3dly, that although the arbitrators did make and publish their award, (which was set out in the plea, and directed a certain sum to be paid by the defendant to the plaintiff, on the defendant's subscription to the policy,) yet that they did not, before making the same, appoint any time for hearing the defendant or his witnesses or proofs, touching the matters referred, or for proceeding in the reference: and that the said award was made without the arbitrators having heard or examined any witnesses or proofs, on behalf of the defendant, and without their having given him any opportunity of producing any witnesses, &c., or of examining or observing upon the plaintiffs witnesses and proofs, &c.: And that after the making of the award, and before the time appointed for the payment of the money thereby awarded to the plaintiff, and before the last day of the term next after such award made and published, the plaintiff and defendant *mutually consented and agreed to waive, relinquish and abandon* the said award, and all claim and benefit on either side upon or by virtue thereof, and to discharge and acquit each other from the performance of the same: and that the said award was *thereupon waived and abandoned, and the performance thereof relinquished* by the plaintiff and defendant, and that no other award concerning the same matters has been made, &c. A 4th plea stated, that the award was made without hearing the defendant, or giving him an opportunity of producing his witnesses, (as before,) not stating the subsequent waiver of it: and a 5th plea relied on the waiver as before stated, after the award was made. The plaintiff by his replication took issue on the 1st plea: and to the second, pleaded an award as set out, made within time, by which the arbitrators awarded the defendant to pay a certain sum to the plaintiff: and demurred to the 3d, 4th, and 5th pleas; stating for special causes of demurrer, that the defendant in his 3d and 5th pleas, has relied on a supposed consent and agreement to waive, relinquish, and abandon the award, and has not pleaded the same to be made by any deed, or made a profert of any such deed: and in the 3d and 4th pleas has pleaded matter arising from supposed misconduct or neglect of the arbitrators to avoid the award: which it is not competent to him to plead: the same, if it existed, being matter of application to the Court to set aside the award, and not matter of plea; particularly as the defendant has not imputed fraud to the arbitrators, or shewn that he had any witnesses or proofs to produce before them; nor has alleged that he did not know of their meetings to make the award. Joinder in demurrer.

The Court, stopping *Wigley* in support of the demurrer, asked *Marryat*, who was to support the third plea, whether the matter therein disclosed could serve otherwise than as ground on which to have applied to the equitable jurisdiction of the Court for the purpose of setting aside the award: (1) but suggested that it could not be pleaded in bar to the award. (2) And *Lawrence*, J. mentioned *Wills v. McCarmick*, 2 Wils. 148, where the Court said, that the partiality of an arbitrator could not be pleaded to an action on the award.

Marryat observed, that in *Chicot v. Lequesne*, 2 Ves. 315, Lord *Hardwicke* only said, that he knew of no case of that sort; but he thought it would be very strange if there could be no defence at common law against an action upon a corrupt award. And he argued, that an award made without hearing one of the parties was as no award.

The Court however being strongly against him on this point, he next relied

(1) Vide *Ridout v. Pain*, 3 Atk. 494. *Anon.* 3 Atk. 644. *Ives v. Medcalfe*, 1 Atk. 64. *Bulkley v. Stewart*, 1 Day, 132. *Bulkley v. Starr*, 2 Day, 553.

(2) Vide *Bulkley v. Stewart*, 1 Day, 130. *Newland v. Douglass*, 2 Johns. 62. *Barlow v. Todd*, 3 Johns. 367. *De Long v. Stanton*, 9 Johns. 38.

on the waiver and relinquishment of the award by the parties, or as upon an accord and satisfaction. But all the Court were satisfied, that the defendant could not plead a collateral agreement by parol to invalidate a claim arising upon deed. (a) That his only remedy was by bringing a cross action upon the agreement against the plaintiff, for suing upon the bond, in breach of such agreement; for it is not even pleaded as accord and satisfaction; but only as an agreement to *waive*, without any act done: which is mere figurative language. On the first ground Lord *Ellenborough*, C. J. added, that it was not inconsistent with the facts admitted by the demurrer that the parties might have delivered in their statements in writing, by consent, to the arbitrator who might have decided upon them. But supposing that case were excluded, how could the injustice of an arbitrator be pleaded against one of the parties, without at least implicating him in that misconduct; which was not attempted to be done by this plea. And still the defendant could not get rid of the award, unless by shewing that the arbitrator's not hearing him made it no award. But his Lordship suggested that the defendant might not be without remedy, if a proper case were laid by affidavit before the Court, upon a motion for discharging so much of the rule for making the submission to the award a rule of Court as restrained the defendant from filing a bill in Equity. (b)

Judgment for the Plaintiff.

Horn v. Hughes.

8 East, 347. April 28, 1807.

If a debt be reduced by part payment below 5*l.* before the action brought, the case is within the *London* Court of Requests act, 39 & 40 G. 3. c. 104.

UPON a rule for entering a suggestion on the *London* Court of Requests act 39 & 40 Geo. 3. c. 104, that the original cause of action did not exceed 5*l.*, and that the same was recoverable in that Court; it appeared that the original sum due from the defendant to the plaintiff was 6*l.* 9*s.*, but the plaintiff's witness proved that 2*l.* had been paid by the defendant before the action was brought. *Marryat*, who shewed cause against the rule moved by *Wigley*, said, that *Clark v. Askew*, (c) where a part payment which reduced the debt below 40*s.* before the action brought was held to bring the case within the *Southwark* Court of Requests act, 22 Geo. 2. c. 47, turned upon the wording of that act, which was different from the *London* act: which says, (s. 12,) "that if any action shall be commenced in any other Court than the said Court of Requests for any debt not exceeding 5*l.* &c. then the plaintiff shall not by reason of any verdict for him be entitled to any costs," &c. And here the action was commenced for more than 5*l.*; and it could not be told what the balance might be before the trial.

LORD ELLENBOROUGH, C. J. It is unnecessary to say what we might have thought, if it had appeared that the plaintiff had a reasonable ground for bringing his action for more than 5*l.*, but that from the absence of a witness or other cause, without his default, he had failed in proving his whole demand: but here it appears that less than that sum was due at the time of bringing the action by means of a part payment of which he must have been cognizant.

Rule absolute.

(a) Vide *Blake's case*, 6 Co. 43, b. *Roe v. Harrison*, 2 Term Rep. 425, and *Heard v. Wadham*, 1 East, 619.

(b) Such an application was accordingly made, and a rule *nisi* granted in the ensuing term; which the Court seemed disposed to have made absolute; but the plaintiff's counsel agreed to refer the matter to another arbitrator.

(c) Ante 28.

Seare v. Prentice.

8 East, 348. April 29, 1807.

An action on the case lies against a surgeon for gross ignorance and want of skill in his profession as well as for negligence and carelessness, to the detriment of a patient; though if the evidence be of negligence only; which was properly left to the jury and negatived by them; the Court will not grant a new trial because the jury were directed that want of skill alone would not sustain the action.

THIS was an action on the case brought by the plaintiff, a shoemaker, against the defendant, whom he had employed as a surgeon, for negligently, ignorantly and unskilfully reducing a dislocated elbow and fractured arm of the plaintiff, of which he had undertaken the cure. The cause was tried before *Heath, J.* at the last assizes at *Hertford*; and a verdict having been given for the defendant under the direction of the learned Judge; that direction was now impeached, and a rule *nisi* for setting aside the verdict and granting a new trial was moved for by *Gurney*, upon the ground that there was evidence laid before the jury of the unskilful treatment of the plaintiff by the defendant; but that they were told by the learned Judge, that unless *negligence* were proved, they could not examine into the *want of skill*: and the evidence, he now admitted, did not substantiate the charge of *negligence*, though it proved the want of skill. And he referred to *Slater v. Baker*, 2 Wils. 359, to shew that an action lay against a surgeon, for ignorance and unskilfulness in his profession: and to Bull. N. P. 73, where the general rule is laid down, that in all cases where a damage accrues to another by the negligence, ignorance, or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie: as if a farrier kill my horse by bad medicines, or refuse to shoe, or prick him in the shoeing.

The Court granted a rule *nisi*. And now, upon the Judge's Report being read, the case appeared to be this:

The plaintiff's brother-in-law proved, on his behalf, that on the 2d of *April* 1806, the defendant attended the plaintiff, who had fallen from a horse, and told the defendant that his arm was broken: the defendant said that he thought the arm, which was swollen, was not broken, and applied vinegar to it, and bound it with tape. That the plaintiff was under the defendant's care for ten weeks without being cured: he could not bend his arm or work at his trade. That he then applied to Mr. *Kingston*, another surgeon, and after some time could work, and put his arm to his head. On cross examination the same witness proved that the defendant was first sent for at night, and came directly: that he regularly attended the plaintiff every day but one till the latter applied to Mr. *Pidcock*, another surgeon, who, about nine or ten days after the accident, attended and assisted with the defendant in setting the elbow. Mr. *Kingston*, the surgeon, then proved that in *July* 1806, the plaintiff was brought to him a cripple in his arm, one bone of which was broken obliquely below the elbow. That the plaintiff's arm was almost straight: he could not turn his wrist, and had no motion in the elbow. That the witness broke the callous and set it again, and made (what the witness himself described as) a very fine cure, which was spoken of about the country. He imputed the failure of the defendant in his attempt to cure the plaintiff to *negligence and carelessness*; an apprentice boy (he said) might have known better: that the bone might have been set within five hours after the accident; though he admitted that the swelling, if much, must first be reduced, which might take a fortnight. And he recommended the plaintiff to bring an action. He also spoke to a conversation with the defendant, who considered it as a very difficult dislocation to reduce; and said that he would make a compensation to the plaintiff. The learned Judge told the jury that the gist of the action was

negligence; of which direct evidence might be given; or it might be inferred by the jury, if the defendant had proceeded without any regard to the common ordinary rules of his profession. *That unskilfulness alone, without negligence, would not maintain the action.* And that he was at a loss to state to the jury what degree of skill ought to be required of a village surgeon. But that, whether or not his direction were accurate in this respect, at any rate the witness *Kingston* imputed only *negligence* and *carelessness* to the defendant and *Pidcock*, in not discovering the fracture of the bone of the arm when they reduced the dislocated elbow; which there was no doubt was properly reduced; and that considering all the circumstances of the case, he did not think that such gross negligence was imputable to the defendant as to make him liable in damages to the plaintiff. The report concluded by stating that the jury found a verdict for the defendant, much to the Judge's satisfaction; who intimated that the vaunting language of the witness *Kingston* must have diminished his credit with the jury.

Shepherd, Serjt. and *Espinasse* were now to have shewn cause: but though all the Court seemed to be satisfied, as well now as when the rule was moved for, that the action well lay for unskilfulness in the profession of a surgeon; yet upon a revision of the evidence as reported, they asked of the plaintiff's counsel what evidence there was of *want of skill* in the defendant; *Kingston*, the surgeon, only imputing to him *negligence* and *carelessness*; which the learned Judge had stated to be a ground of action, and had left to the jury for their consideration; but which the jury had negatived; as indeed the evidence well warranted them in doing.

Gurney, in support of the rule, said, that it was to be collected from the whole of *Kingston's* evidence that he imputed want of skill to the defendant; and that was shewn by the expression used by him, that an apprentice boy might have known better. That so much skill at least was required of a surgeon as to be able to tell whether or not an arm was broken or an elbow dislocated. But it was enough that the question of want of skill was wholly withdrawn from the consideration of the jury.

LORD ELLENBOROUGH, C. J. The surgeon who was examined specifically imputed the failure of the cure to *negligence* and *carelessness*, whatever other expressions he may have used in the manner of giving his evidence, upon which the learned judge, has commented. Therefore, however we may differ from the learned Judge, as I certainly do, in thinking that an ordinary degree of skill is necessary for a surgeon who undertakes to perform surgical operations; which is proved by the case in *Wilson*, and indeed by all analogous authorities; in the same manner as it is necessary for every other man to have it in the course of his employment; as the farrier who undertakes to cure my horse must have common skill at least in his business, and that is implied in his undertaking: and although I am ready to admit that a surgeon would be liable for *crassa ignorantia*, and would be justly responsible in damages for having rashly adventured upon the exercise of a profession without the ordinary qualification of skill, to the injury of a patient: yet the question did not arise upon the evidence in this case; for no want of skill was imputed to the defendant; and therefore the opinion of the learned Judge upon that point does not affect the merits of the verdict upon the evidence in the cause.

The other Judges concurred; and *Grose*, J. referred to 3 Blac. Com. (ch. 9. p. 163, 4.) as confirming the general doctrine.(1)

Rule discharged.

(1) Vide Esp. Dig. 601, or vol. 2. p. 222, of *New York* edit. *Lipscombe v. Holmes*, 2 Campb. 441, and the reporter's note thereto, p. 442, 3.

Doe, on the Demises of M. Burrough and Barbara his Wife, v.
George Reade.

8 East, 353. April 29, 1807.

A., a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no controul, and by which he let in *B.*'s remainder) and takes a new copy for the lives of himself, *C.*, and *B.*, successively; and on *A.*'s death, after twenty years had run against *B.*, *B.* enters on the possession then vacant. Held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right, as against him; or might have disabled *B.* if he had continued out of possession, from recovering in ejectment.

THIS was an ejectment brought to recover the possession of certain copyhold premises in the manor of *Damaran* and *Martin cum Tidpitt*, called *Butchers*, &c. in the county of *Wilts*, on the demises of *Burrough* and his wife, and of the husband alone, dated the 2d of *January* 1807. At the trial before *Sutton*, B. at *Salisbury*, the title as to *Butchers* stood thus. A copy of the court roll was produced, dated the 24th of *October* 1735, whereby *George Reade*, the grandfather of the defendant and of *Barbara*, the lessor, took the premises in question, to hold to him and his sons *G. G. Reade* and *W. Reade* successively, during their lives, and the life of the longest liver. On the 13th of *January* 1777, (*G. G. Reade* the eldest son being dead) *W. Reade*, having issue, the defendant *George Reade*, and the lessor *Barbara*, purchased by copy of that date the reversion of the said premises, on the determination of the estate of *G. Reade*, the grandfather, and of his own estate for life therein; to hold to the defendant *George*, his son, then an infant, during his natural life; and the defendant was thereupon admitted to the same. On the 19th of *January* 1786, *W. Reade* surrendered his own life estate and the reversionary estate of the defendant *George* his son, then a minor, and took another grant of the lord by copy of that date, to hold to himself, the lessor *Barbara*, and the defendant *George* successively; and was admitted thereon. *W. Reade* continued in possession till his death on the 28th of *March* 1806, whereupon the defendant entered. The verdict was taken for the plaintiff for all the premises, with liberty, as to *Butchers*, for the defendant to move to set it aside, if the Court should be of opinion with him. Accordingly, on a former day,

Burrough (and *Pell* was with him) moved for a new trial; on the ground, that the purchase of the reversionary estate by *William Reade*, the father, in 1777, to hold to the defendant *George Reade* his son, was according to *Dyer v. Dyer*, (a) and that class of cases, an advancement of the son by the father, which gave the son the legal and beneficial interest in the premises, unless a custom in the manor had been shewn, by which he would be taken to hold

(a) In the Exchequer, *Nov.* 1788, MS. S. C. 1 Watk. on Cop. 216, and 1 P. Wms. 113, 5th edit. in *notis*. The authority of this case was recognized by Lord *Kenyon* in a subsequent case in *B. R.* of *Swift on the Demise of Farr v. Davis*, *Hill.* 39 Geo. 3, where it was held, that where three lives in a copy are to take successively, and a father, who is the sole purchaser, puts in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as, in that case, by taking at the same court a licence from the lord to himself and his mother (who had her widowhood right in the copyhold) to lease for 70 years. In which case, if the father afterwards grant a lease by way of mortgage pursuant to such licence to lease, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives; such custom may so far operate as to divest the legal estate of the lives in reversion and give it to the lessee. Or if there were any doubt of that; or if the licence of the lord might be construed to extend only to the first taker of the new copy jointly with his mother, and the first taker alone executed such licence after her death; yet a court of equity (even if the surviving life, (the son,) succeeded at law on his strict legal title,) would make the son, the surviving life, convey to his father's lessee, and pay all the costs in law and equity. MS.

only for his father. And as no such custom was proved, the father could not surrender the legal estate of the son. But it was objected, that by the surrender, of the father's life estate, the son's reversion was let in, in 1786: that after that time the father's possession was adverse to his; and that the son was barred by not having entered within 20 years after his right accrued: but during part of that time the defendant was an infant: and the father who had a life estate did not die till 1806: and the defendant was not obliged to take advantage of the father's forfeiture.

The Court said, that they supposed that the lessor of the plaintiff relied upon the surrender of the father's prior life estate, which was thereby absolutely determined, and the defendant's reversion let in immediately. But at any rate, as the defendant had taken peaceable possession of the premises on his father's death, and had both the legal and equitable title in him, they saw no objection to his retaining the possession; and therefore granted a rule to shew cause, &c.

Dampier now shewed cause, and relied on the adverse possession of the defendant's father for above 20 years, under whom the lessor *Barbara* immediately claimed; the defendant's life having been postponed to hers in the new copy taken by *Wm. Reade* in 1786; and to which alone his possession must be attributed. Then, if the defendant's right of entry were ousted, as it was, so that he could not have maintained ejectment, it cannot vary the question that he got into possession after the 20 years adverse possession had run against him, which had transferred the possessory right to the lessor.

LAWRENCE, J. This reasoning might have applied, and the difficulty would have existed, if *George Reade* had been now a plaintiff instead of a defendant in ejectment; and were contending against any person who had an adverse possession against him: but what possession has *Barbara Burrough* against him? She is in effect a stranger to the estate, having no present title, and can have no right to recover in ejectment against one who is admitted to have the legal title, and is also in possession. The question might have arisen in the lifetime of *Wm. Reade*, the father, after 20 years adverse possession by him: but upon his death, there being no person in possession, there was nothing to hinder the defendant from asserting his right by entering peaceably into a vacant possession; and now he has both the legal title and the possession.

The Court all agreed, that the defendant, being lawfully in possession, might defend himself upon his title, though 20 years had run against him before he took possession; such 20 years possession not being the possession of the lessor of the plaintiff.

Rule absolute.

Goodtitle, on the Demise of Wright, v. Otway.

8 East, 357. April 20, 1807.

After verdict in ejectment for a message and tenement, the Court will give leave to enter the verdict according to the Judge's notes for the message only, (pending a rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages.

THIS ejectment was brought for a message and tenement; on which, after verdict, it was moved to arrest the judgment, for the uncertainty of the description, upon the authority of *Goodtitle v. Walton*, 2 Stra. 834, and *Doe v. Plowman*, 1 East, 441: and a rule nisi having been granted, it was moved by *Jekyll*, pending that rule, to enter the verdict, according to the Judge's notes, for the message only. *East* shewed cause against the latter rule, and cited *Wood v. Payne*, Cro. Eliz. 186, and *Burbury v. Yeomens*, 1 Sid. 295, to shew that the verdict could not be entered for the message only, unless the lessor of the plaintiff released the damages, (a) which were entire, and could not be

(a) The costs follow the damages by the statute of Gloucester.

severed by the act of the Court; the plaintiff having brought the ejectment for lands as well as for a house, and the whole case having gone to the jury, upon a question of heirship, and no distinct evidence given as to any messuage.

The Court, however, made the rule absolute for entering up the verdict for the messuage only, without obliging the lessor of the plaintiff to release the damages; which being merely nominal in this case, they said, would follow the verdict for the messuage, in the same manner as if the question had occurred at the trial, and the verdict had in the first instance been taken for the messuage only.(1) The other rule of course fell to the ground.

Cobb v. Stokes.

8 East, 358. April 30, 1807.

Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term to put an end to the tenancy; but a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over; but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter.

IN debt for 50*l.*, the declaration stated, that on the 25th of September 1805, it was agreed between the plaintiff and the defendant, that the defendant should take and hold a messuage, with the appurtenances, &c. at *Sydenham*, as the same were then late in the possession of one *Turner*, for one year and no longer, from the 24th of June then last; by virtue of which agreement the defendant entered and continued in possession until the 24th of June 1806, when the term ended. That the plaintiff on the 11th of August, whilst the defendant was in possession, gave notice and demand in writing for delivering possession to the plaintiff; but the defendant did not deliver up the possession, but held over for three months. That the annual value of the messuage, &c. was 20*l.*, and the plaintiff became entitled to 10*l.* as double rent, &c. There was a second count for 20*l.* for use and occupation; and a third count for use and occupation upon a *quantum meruit*. The defendant pleaded *nil debet*: and also a set-off to the two first counts, for money paid for the plaintiff at his request to *G. W. Meriton*, then being the ground landlord of the premises, for and on account of the ground rent reserved out of the same; and for money paid; and upon an account stated. There was a similar set-off to the last count.

At the trial before the Lord Chief Baron at *Maidstone* the plaintiff proved the agreement, as stated in the declaration, to occupy the premises for one whole year from the 24th of June 1805 to the 24th of June 1806, and no longer, at the rent of 8*l.* 8*s.* a year, (payable, quarterly); and also proved a demand of possession, and notice given by him to the defendant to quit on the 11th of August 1806, or to pay double rent. The plaintiff's demand was reduced by a payment of 10*l.* 10*s.* by the defendant to *Meriton* the ground landlord, to 4*l.* 11*s.* 3*d.*, (a) for

(1) Vide *Jackson d. Moore v. Van Bergen*, 1 Johns. Ca. 101. *Talbot v. Wheeler*, 4 Day, 448.

(a) It was thus calculated at the trial;	£ s. d.
One year's single rent to the 24th of June 1806	8 8 0
Double rent from the 24th of June to the 3d of November, when the writ issued	6 13 3
Deduct for ground rent paid	15 1 3
Verdict taken for balance of	10 10 0
	4 11 3

which the jury gave a general verdict. The questions in this case were, whether the demise being for a year and no longer, any notice to quit were necessary at the end of the term; or whether the subsequent notice, so late after the 24th of *June* as the 11th of *August*, did not come too late; especially for the purpose of making the defendant a trespasser by relation, so as to fix him with double rent: or, if liable to pay double rent at all, whether the defendant were liable to pay it before the time of actual notice and demand of possession? The defendant had leave to move the Court to enter a verdict for him, if they should so think fit. A rule nisi was accordingly obtained for this purpose, which was supported by *Shepherd*, and *Bayley*, Serjts., and opposed by *Garro*, *Holroyd*, and *Comyn*.

It was admitted, on the part of the defendant, that the demise having been specifically for one year, no previous notice was necessary to put an end to the tenancy at that period; but that the landlord might have immediately maintained an ejectment in case the tenant had then refused to quit. But it was contended, that the landlord having omitted to put an end to the tenancy at that time, and having suffered the tenant to continue so long after as the 11th of *August*, must be taken to have agreed to his continuing in possession upon the original terms, and could not entitle himself by any subsequent notice in the middle of a year to double rent; for that would be to entrap the tenant, and make him a trespasser by relation, when he had reason to consider that he was holding over with his landlord's consent. That in *Cutting v. Derby*, 2 Blac. Rep. 1075, the Court considered it more proper for the landlord to give notice even before the expiration of the term, to prevent surprize on the tenant. That this was not a case within the stat. 4 Geo. 2. c. 28, which charged the tenant with double the yearly value in case of his wilfully holding over: for that was only meant to apply to cases where the holding over was plainly wrongful and without colour of title: and at any rate would only apply, by the very terms of it, after the demand made, and notice in writing to deliver up possession: whereas the plaintiff took a verdict upon a calculation for double rent as from the 24th of *June* instead of the 11th of *August*. But if he were not entitled to double rent as from the 24th of *June*, this inconsistency would follow upon the claim of it from the 11th of *August*, that the defendant must be acknowledged as tenant after the 24th of *June* when the year ended; which must be taken to be upon the terms of his former holding, which made the rent payable quarterly; and yet in the middle of a quarter he would become a trespasser: but he could not be both tenant and trespasser by implication during the same, or any part of the same period. That if the plaintiff were not entitled to any double rent, then the set-off was sufficient to cover his demand: for only a year and a quarter's rent was due before the bringing of the action, and that was covered by the 10 guineas paid for the ground-rent; and the rent being reserved quarterly, the landlord could not recover for a fraction of a quarter. But that at any rate the verdict was taken for too much.

It was admitted on the other side that the plaintiff was only entitled to double rent from the 11th of *August*, when the notice to quit with a demand of possession was given. They insisted however at first on single rent between the 24th of *June* and the 11th of *August*; but in this they were over-ruled by the Court; who being with the plaintiff upon the other points, no further argument was had upon them.

The Court were finally of opinion, that the demise being for one year and no longer, a notice to quit was not necessary at the end of the year in order to put an end to the tenancy: (a)(1) but that a demand of possession was neces-

(a) See the same rule laid down by Lord Mansfield in *Messenger v. Armstrong*, 1 Term Rep. 54, and in *Right v. Darby*, *ibid*. 162. In the latter of which his lordship also said; "If there be a lease for a year, and by consent of both parties the tenant continue in possession afterwards, the law implies a tacit renovation of the contract; they are supposed to have renewed the old agreement which was to hold for a year," &c.

(1) [See acc. *Bedford v. McElherron*, 2 S. & R. 50. *Logan v. Herron*, 8 do. 459. *Lesley v. Randolph*, 4 R. 126. *Ellis v. Paige*, 2 Pick. 71.—W.]

sary in order to entitle the plaintiff to double rent or value. That such demand however need not be made for that purpose on or before the expiration of the term, but might be made afterwards; (the landlord, as Lord *Ellenborough* observed, not having in the mean time done any act to recognize the defendant as continuing to be his tenant :) and that here the plaintiff having on the 11th of *August* demanded the possession, and given notice in writing to the defendant to deliver up the premises, had complied with all which the act of the 4 Geo. 2. c. 28, required of him: after which the defendant must be taken to have wilfully held over; and then the statute entitled the plaintiff to the double value from that time. But they also held that if the plaintiff took his verdict for the double value from the 11th of *August*, he could not recover the single rent, as upon an implied tenancy with reference to the former holding, for the fraction of the quarter between the 24th of *June* and the 11th of *August*. The verdict therefore was directed to be altered accordingly: (a) on which the rule was discharged.

Howell and Others v. Harding.

8 East, 362. May 1, 1807.

The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause.

GURNEY, on the part of the plaintiff, had obtained a rule, calling on the defendant to shew cause why 17*l.* due to the latter from the plaintiff, as costs for not proceeding to trial in this cause, pursuant to notice given at a former time, should not be deducted from 30*l.*, for which a verdict had ultimately been entered for the plaintiff by the direction of an arbitrator to whom the cause had been referred: and that no attachment should issue against the plaintiff for the non-payment of the said 17*l.* This was moved on an affidavit that the defendant had sold off all his property, and was believed to be about to abscond: and that the plaintiff had no other means of securing himself.

Lawes opposed the rule, on behalf of the defendant's attorney, for whom he claimed a lien on these costs: and cited *Mitchell v. Oldfield*, 4 Term Rep. 123; *Read v. Dupper*, 6 Term Rep. 361; *Randle v. Fuller*, *ib.* 456, and other cases, to shew that the attorney has such a lien against the adverse party.

But all the Court agreed, that the attorney's lien only attaches upon the balance of the costs accruing in the same cause, which are ultimately to be paid over to the one or other party in that cause: and that the cause is not to be split, so as to give the attorney of either party a lien upon interlocutory costs, although ultimately his client should be bound to pay costs to a greater amount to the adverse party. None of the cases, they said, went this length, and it would be unjust to extend the lien so far. *Mitchell v. Oldfield* was an attempt to set off the debt and costs in another suit between the parties against the attorney's lien in the subsisting suit; which was not allowed. And so was *Randle v. Fuller*. That the attorney was only a representative character, and had a right to represent his client in this respect upon the general and final

(a) The plaintiff remitted 3 <i>l.</i> 1 <i>s.</i> 3 <i>d.</i> and took his verdict within the mark	£ s. d.
for 1 <i>l.</i> 10 <i>s.</i> that is, for one year's single rent to 24th of <i>June</i>	8 8 0
Double rent from the 11th of <i>August</i> to 3 <i>d.</i> of <i>Nov.</i> about	3 17 0
	12 5 0
Deduct ground rent	10 10 0
	1 15 0

result of the cause: that his lien was entire, not one lien upon the costs of the declaration, another upon the costs of the plea, and so forth.

Rule absolute.(a)

Omealy v. Newell.

8 East, 364. May 2, 1807.

An affidavit of debt made by the plaintiff residing in a foreign country before a foreign magistrate, whose signature to the jurat and his authority in that country to administer oaths and take affidavits were verified by a proper affidavit in this country, is a sufficient foundation for a Judge's order to hold the defendant to special bail: and this, notwithstanding the stat. 12 G. I. c. 29, which requires an affidavit of the cause of action by the plaintiff, (by which must be understood such an affidavit taken before a competent jurisdiction in this country, whereon, if false, perjury might be assigned :) for that branch of the statute is restrictive of the acts of plaintiffs only, and not of the courts. But any person making or knowingly using a false affidavit so made abroad for this purpose is guilty of a misdemeanor in attempting to pervert public justice, and is punishable by indictment.

THE defendant, a citizen of the United States of America, who had come to this country, was arrested and held to bail by a Judge's order, upon an affidavit of debt for 1300*l.* contracted in America, sworn to by the plaintiff, another citizen of America, then at Paris, before a person of the name of Bonomee, who verified the affidavit in this manner; "sworn at Paris on (a certain day) before me, notary public, magistrate, competent in this behalf, and duly authorized by the laws of France to administer oaths and take affidavits. (Signed) D. F. C. Bonomee." And the signature of Bonomee, and that he was a magistrate of France authorized to administer oaths and take affidavits, were verified by a proper affidavit sworn here. An application was made for the defendant's discharge in last Michaelmas term, upon the ground of the insufficiency of the affidavit to hold to bail; and the matter was debated several times; when the Court, considering the question to be of very general and extensive consequence, directed the case to be set down for argument in the peremptory paper of Hilary term last, upon a rule nisi for discharging the defendant on filing common bail.

The point was then very fully debated by Park and Parnter on shewing cause against the rule, and by Sir V. Gibbs and Scarlett in support of it. Upon the principal question as to the existence and foundation of the practice before the stat. 12 Geo. 1. c. 29, and its legality afterwards, there were cited *Roberts v. Slingsby*, 2 Keb. 101; *Walrond v. Van Moses*, 8 Mod. 323, Regula Generalis of 1654; *Rios v. Belifante*, 2 Stra. 1209; *Van Morsell v. Julian*, 1 Wils. 231; *Pomp v. Ludvigson*, 2 Burr. 655; *Ex parte Worsley v. Harrison*, Dy. 249. a. pl. 84; *Rez v. Mawbey*, 6 Term Rep. 619. 635; *Rez v. Crossley*, 7 Term Rep. 315, and to 2 East's P. C. 821, which cites *R. v. Blackburn*, M. 36. Car. 2. Trem. P. C. 101. Upon this part of the case

Lord ELLENBOROUGH, C. J. at the conclusion of the argument said, that he had not the least doubt, that any person making use of a false instrument in order to pervert the course of justice was guilty of an offence punishable by indictment. That the case of *The King v. Mawbey*, and others, went the whole length of that proposition. Upon the principal point, he adverted to the practice of receiving affidavits of this description for the same purpose,

(a) Vide *Nancy v. Modigliani*, 1 H. Blac. 217.

which had uniformly prevailed as far back as living memory could trace it, and up to the time of Lord Chief Justice *Lee*; supported as it was by the note in 8 Mod.; and said, that before they could consign all the courts of *Westminster-hall* to blame for so long a period, in having, as was suggested, overleaped their legitimate authority, it was their duty to examine at leisure the very basis of the practice; to see whether it might not be reconciled with the provisions of the statute of the 12 Geo. 1. c. 29, which, as then advised, he thought was intended only to restrain the acts of plaintiffs in holding defendants to bail, and not to fetter the discretion of the Court in this respect. That affidavits sworn before the Lord Mayor of *London* were generally received and acknowledged in foreign countries; and that he should be very sorry to find that the courts of this country were under the necessity of dealing out in future a narrower measure of justice to foreign states than those states were in the habit of administering to us.

Curia advisare vult.

Lord ELLENBOROUGH, C. J. now delivered the judgment of the Court.

This was an application to the Court to discharge the defendant, who had been held to bail under a Judge's order, made upon an affidavit of debt sworn before one *Bonomee*, a magistrate at *Paris*; and the questions were, first, whether since the statute 12 Geo. 1. c. 29, a defendant could be held to special bail, except under the terms of that statute, viz. upon an affidavit of the cause of action of the plaintiff, made before a judge or commissioner of the court, and filed according to the custom of the court, and by indorsement on the writ of the amount sworn to, as required by the statute. 2dly, Whether, supposing a defendant could be held to bail otherwise than under the terms prescribed by the statute, he could be so in respect of an affidavit made out of *England*: and if he might be held to bail under an affidavit made out of *England*, whether there be any difference in this respect between affidavits of debt made in *Ireland* and *Scotland*, and affidavits made in foreign parts not within his majesty's dominions. 1st, The statute 12 Geo. 1. c. 29, in the first section generally prohibits the holding to bail in superior courts for causes of action under 10*l.* and in inferior courts, under 40*s.* This prohibition applies to every species of holding to bail, as well by affidavit of the party, sworn as required by the statute as otherwise. The first branch of the 1st section of the statute is therefore restrictive of the authority of the Court in this particular, as well as of the act of the plaintiff. The second branch of this first section appears in terms to be restrictive of the act of the plaintiff only: at least it is capable of being so construed, if the usage and practice of the Court before and since the statute should be found to accord with and warrant that construction. The provision is, that in causes of action in the superior courts, not amounting to 10*l.* &c., and where *the plaintiff or plaintiffs* shall proceed by way of process against the person, "*he, she, or they shall not arrest or cause to be arrested*" the body of the defendant or defendants. And the 2d section goes on to direct the mode in which *the plaintiff* shall proceed by affidavit made and filed, and by indorsement on the writ, in order to arrest the defendant; and unless this mode be pursued the 2d section of the act concludes with directing that "*the plaintiff or plaintiffs shall not proceed to arrest the body of the defendant:*" all along in its terms, adverting to the arrest made under the directions of the statute, as *an arrest by the plaintiff*, and not as one by the act of the Court. The usage of the Court anterior to the statute appears to have been, to receive affidavits sworn abroad and verified here, for the purpose of making orders thereupon to hold defendants to bail. In a note subjoined to the case of *Sir John Walrand v. Van Moses*, Mich. 11 Geo. 1, being the year immediately preceding the stat. 12 Geo. 1, as reported in 8 Mod. 322, it is stated "that the Court held that a plaintiff who was in *Holland*, might make affidavit there, and get it attested by a public notary, and "that it should be admitted *as evidence* to hold the defendant to special bail

"here." In other words, that the Court might act upon evidence derived through the medium of an affidavit made abroad, as a sufficient foundation in point of fact whereupon to make an order for holding the defendant to bail. Of course, therefore, recognizing both the authority and the practice of the Court on this subject. The Court seems to have exercised an authority occasionally before the 12 Geo. 1, of regulating the sum in which the party, taken upon a *capias* issued by them, should be held to bail. It was the duty of the sheriff to have the body of the defendant at the return of the writ; and he was first *obliged* to take bail by stat. H. 6. 23 H. 6. c. 10. Vide Tidd's Prac. 122. c. 7; but the amount in which he should require it, (not exceeding of course the amount of damages mentioned in the writ,) was left to his discretion guided by such information as he should be able to acquire. But the Court, under whose authority the writ issued, in many cases regulated the sum for which, and the cases in which, bail should be required by its own discretion. In *Michaelmas* term 1654, the Courts of K. B. and C. P., by rules of their respective Courts made in nearly the same words, expressly regulated this subject in respect to actions of covenant, of battery, conspiracy, false imprisonment, and of slander; which latter description of action they wholly excluded from special bail; except the slander were of title, in which case it was left to the discretion of the Judges whether there should be any bail, and to what amount. And it appears by Style's Practical Reg. 107, that the Court exercised a power in some cases of dispensing with bail altogether, and accepting from the defendant a deposit to a competent amount in lieu of it. And by the course of the Court long before the stat. 12 Geo. 1, bail was not requirable, if the defendant were sued for a sum under 10*l.*; according to Style's Pract. Reg. 115. In this and various other instances the Court appears to have acted authoritatively on the subject of bail, as a matter peculiarly within its province: but, in general, the adjustment of the amount to which the party should be held to bail was a matter left to be settled between the plaintiff and the officer in the first instance, according to the information afforded by the one, and the discretion exercised thereupon by the other. But as great abuses arose in cases of arrests on general writs of trespass, which was the usual form of writs before the stat. 18 Car. 2. c. 3, from the ignorance which defendants laboured under as to the nature of the action for which they were arrested; and which the officer also laboured under, as to the amount for which he should take bail for the defendant's appearance; the statute last mentioned directed, that no person arrested upon such general writ in which the true cause of action was not expressed, should be forced to give security for his appearance at the return of such writ in any sum exceeding 40*l.* This statute however afforded an imperfect cure to the evil; for the party might still be arrested to the amount of 40*l.*, as he might have been before the statute; and although a cause of action was required to be expressed in the writ, in order to authorize the arrest of the defendant to a larger amount than 40*l.*; yet still the true cause of action was not required to be verified by oath or otherwise; nor was the plaintiff subjected to any particular penalty if the cause actually expressed in the writ should not be the true cause of action. The ultimate remedy on this subject was applied by the stat. 12 Geo. 1: but this statute, except so far as it prohibits the holding to bail at all upon process out of the superior courts under 10*l.* &c., is not, as has before been observed, directly restrictive of any authority antecedently exercised by the Court, in respect to the holding to bail, but of the act of the plaintiff, in arresting by his own unaided act only. It left the practice therefore of arresting under an order of Court as it stood before the act. The statute is in its letter and terms at least susceptible of this restrained construction: it has constantly received this construction ever since it was passed; and has been acted upon accordingly as far back as the practice of the Court can be ascertained by living memory, or traced by accessible documents of even an earlier period. The

practice therefore may be considered as affording a contemporary construction of an act, not in its terms inconsistent therewith: and it is reasonable to suppose that the legislature might think that the same restrictions and guards, which it imposed on arrests by the mere act of the party, and of which it might be justly jealous, were not equally necessary to be applied to arrests made under the check and controul, and authorized by the immediate sanction, of the Court. On the ground therefore of such a practice as has obtained on this subject, we are of opinion that the stat. 12 G. 1, worded as it is, does not prohibit the holding to bail by a Judge's order without the affidavit and other requisites which are prescribed in respect to arrest by the mere act of the plaintiff himself.

The next question is, whether supposing a defendant may be held to bail by a Judge's order, he may be so, under an affidavit made out of *England*. And as, upon this supposition, the forms prescribed by the statute are unnecessary to be observed, upon a different species of arrest than that to which the statute relates, the amount of the debt may be made appear to the court by any such medium of evidence and information, as was resorted to for that purpose before the statute, or as the Court might judge to be in its nature reasonable and proper. It is said in *Style's Prac. Reg.* 105, (speaking of course before the statute,) that if a plaintiff required special bail, he ought to have shewn his cause of action before the Judge who took the bail; "or else to draw such a declaration as he would stand to, and shew it to the defendant's attorney; that it might appear to the court that there was cause why special bail should be given; otherwise common bail should be filed." It appears also from the note of the case in 8 Mod. 322, immediately preceding the statute, that an affidavit made in *Holland*, was admitted as competent evidence to the Court of the cause of action whereupon to hold the defendant to bail here. So that it appears that the Court exercised this authority upon various media of proof as to the nature and amount of the plaintiff's demand, and amongst others through that of affidavits made abroad. The most frequent instances in which the Judges have made such orders for holding to bail occur in respect to affidavits made in *Scotland* and *Ireland*, and the practice of doing so has been very common both in this Court and in C. P. as far back as any inquiry can be made with effect. One case of applications to hold to bail on foreign affidavits, in which the practice was drawn under the observation of the Court, occurred in the time of Lord *Mansfield*, — *v. Brown*; and another, the case of *Voght v. Elgin*, in the time of Lord *Kenyon*, Hil. 38. G. 3. It appears by a short note of the latter case by my brother *Lawrence*, that the defendant was held to bail, on an affidavit sworn before the prætor at *Hamburg*, on the motion of Mr. *Gibbs*. Search has been made, and we have found the original affidavit filed in Court, made before the prætor of *Hamburg*, and his signature and authority to administer an oath verified by affidavit made here; as also the rule of court granted on reading those affidavits to hold the defendant to bail for 2000*l*. It does not appear that any difference in point of reason or law exists between the holding to bail, as it is practised in the more frequent instances of affidavits made in *Ireland* and *Scotland*; and of affidavits made in places abroad out of his Majesty's dominions. The practice in both cases must be equally warranted or unwarranted. In none of these cases can the party making a false affidavit be indicted specifically for the crime of perjury in the courts of this country: but in all of them, as far as the party is punishable at all, he is punishable for a misdemeanor, in procuring the court to make an order to hold to bail by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. The party injured thereby is not without his remedy: nor the court without its due means of punishment in respect of the abuse and contempt committed against its authority. And as such a practice as has been stated, not inconsistent with the letter of the act of 12 G. 1, has prevailed ever since the act, and by

probable inference and presumption before the act also; we are of opinion that the practice itself may be sustained in point of law, as to both descriptions of affidavits made out of *England* and verified here; namely, those made abroad out of his Majesty's dominions before some magistrate or person of competent authority there, as well as before Judges and other persons authorized to take affidavits in *Ireland* and *Scotland*; and therefore that this rule must be discharged.(1)

Hill v. Patten.

8 East, 373. May 2, 1807.

A policy effected on "ship and out-fit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent, after the ship sails, and the risk attaches, to an insurance on "ship and goods," without a new stamp; *out-fit* the subject matter of insurance being essentially different in a such voyage from *goods*; and therefore not within the exception of the stat. 35 Geo. 3. c. 63. s. 13, which enables alterations to be made in the *terms* or *conditions* of a policy, without having a new stamp, so that *the thing insured remains* the property of the same persons, &c.

It seems however that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the *African* and other trades,) out and home, may be covered by an insurance on goods.

THIS was an action upon a policy of insurance on *ship and out-fit*, in a voyage upon the southern whale fishery out and home, which was effected in September 1804: and on the 13th of March 1805, long after the sailing of the ship on the voyage insured, but before any advice received of her, in consequence of some misunderstanding between the broker and his principal as to the broker's instructions at the time of effecting the policy, an application was made to the underwriters, who agreed to alter it,(a) which was done by a memorandum indorsed on the policy in these words; "It is hereby agreed that the interest on this policy shall be on *ship and goods* instead of *ship and out-fit* as originally declared." The ship was afterwards lost in the course of the voyage. It was objected at the trial before Lord *Ellenborough* at *Guildhall*, that however the policy might have been effected in the original terms of it, through a misunderstanding between the principal and his agent, yet the contract was equally binding between the contracting parties at the time: and as the risk had once attached, it was not competent to the parties to make the alteration, though by consent, without a new stamp; *goods* being a distinct subject matter of insurance from *out-fit* in such a voyage: and therefore not within the exception of the stat. 35 Geo. 3. c. 63. s. 13, which enables the parties to make any alteration in the *terms* or *conditions* of a policy, so that *the thing insured*, (which must be taken to mean the same subject matter of insurance,) shall *remain* the property of the same person. The plaintiff however recovered a verdict; which was moved to be set aside in *Michaelmas* term last; and a rule *nisi* was granted: against which *Dallas*, *Marryat*, and *Lawes* shewed cause; and *Garrow*, and Sir *V. Gibbs* supported the rule. The case was directed to stand over till the judgment of the Court was given in *Kensington v. Inglis*,(b) in which the same clause of the stamp act was under consideration. And now

LORD ELLENBOROUGH, C. J. delivered the opinion of the Court.

(1) [An affidavit of debt made before a magistrate in a foreign country, (accompanied by a certificate of a notary public of the same place that the magistrate was duly commissioned, &c.) is considered sufficient to hold to bail, without other evidence of the demand. *Walker v. Bamber*, 8 S. & R. 61.—W.]

(a) The policy, as it originally stood, was on *ship and goods*, which was restrained by a written note in the margin to *ship and out-fit*; after which the indorsement restored it to *ship and goods*.

(b) *Ante*, 273.

The question in this case was, whether the alteration of this policy, from a policy upon *ship and out-fit* to one on *ship and goods*, required an additional stamp, within the meaning of the statute 35 Geo. 3. c. 63. s. 13. The policy was "at and from *London to the South Seas*, during the *ship's stay and fishing there*, and at and from thence to *Great Britain, &c.*" The alteration was made from *ship and out-fit* to *ship and goods*, by consent of the underwriters, after the ship had sailed on the voyage insured, and of course after the policy had fully attached upon what was, at the time of such sailing, the thing or subject insured, viz. *ship and out-fit*. *Out-fit*, particularly for such a voyage as is described in the policy, differs materially from what is comprehended under the term *goods*. *Out-fit*, in a fishing voyage, principally consists in the apparatus and instruments necessary for the taking of fish, seals, &c., and the disposing of them, when taken, in such a manner as to bring home the oil, blubber, bone, skins, and other animal produce of the adventure, with the greatest convenience and advantage. As far as the *out-fit* consists of *provisions* put on board for the use of the crew, it is, (according to the case of *Brough v. Whitmore*, 4 T. R. 206,) covered by an insurance on *ship*, being in effect part of the necessary *furniture, stores, and equipment* of every ship proceeding on a voyage. But *out-fit*, though it may in this qualified sense be considered as part of the ship or ship's furniture, yet it cannot be considered as *goods* in any proper sense of that word; i. e., as part of the wares or cargo for sale, laden on board the ship; still less as part of the *homeward bound cargo* in this voyage out and home; recollecting that in a fishing voyage the only cargo on board the ship from first to last is, in general, the homeward bound cargo, consisting of the immediate produce and result of the fishing adventure. The *out-fit*, originally insured, being therefore thus essentially different from *goods* afterwards made the subject of insurance under this policy, the question is, whether such a change in the subject matter of the insurance may be made in a policy once effected, without an additional stamp, in virtue of the provisions of the stat. 35 Geo. 3. c. 63. The 13th sect. of the statute on which the question arises provides, "that nothing contained in the act shall prohibit the making of any alteration, which may lawfully be made in the *terms or conditions* of any policy of insurance duly stamped as aforesaid, after the same shall have been underwritten, or to require an additional stamp duty by reason of such alteration: so that such alteration be made before notice of the determination of the risk originally insured, and the premium or consideration originally paid or contracted for shall exceed the rate of 10s. per cent. on the sum insured; and so that *the thing insured shall remain the property of the same person or persons*; and so that such alteration shall not prolong the term insured beyond the period allowed by this act; and so that no additional or further sum shall be insured by reason or means of such alteration." And the question is, whether that part of the provision, which requires that "*the thing insured shall remain the property of the same person or persons*," has been in this case well complied with or not. The words, "*the thing insured shall remain the property*," &c., appear to us properly to require and apply to *one* identical and continued subject matter of insurance: such subject matter *all along remaining* the property of the same proprietor; and to be ill suited to a case like the present, where the thing last insured is not only in fact, but in name and kind, (as a specific subject of insurance,) essentially different from the thing first insured; and which begins also to have an existence at a different and much later period than the other; and when the thing, first insured, hardly, or in a small degree, *remains* or *continues* to exist at all. To make the words of the provision tally with such a case, instead of "*the thing insured*," it should be read, in the plural number, "*the things insured*;" and instead of "*shall remain*," it should be read "*shall be the property*," &c. Without some such change in its phrase, the act cannot well be accommodated to the case of several things, different in name and

kind as subjects of insurance, successively existing, and successively covered by one and the same policy of insurance: which is the case now before us. It is not however to be inferred from hence, that shifting of successive cargoes on board the same ship, in the course of the same continued adventure, as in the *African* and other trades out and home, may not properly be the subject of insurance under the word *goods*: for in some of those cases the successive cargoes, i. e. of *English* goods, *African* articles of traffic, and lastly *West India* produce, are according to the course of such trading adventures, one continued subject matter of insurance, under the *one* name of *goods*. The adventure is the same in its general denomination from first to last; though the parts of which it consists are not co-existing, but successive, and in kind and quality wholly dissimilar from each other. With all the unwillingness which we cannot but feel to give way to an objection, which the underwriters bring forward in despite of their own consent on this subject once given, we are nevertheless obliged to give effect to it, by pronouncing that the terms of the act have not been complied with; and that the policy, in its last and altered state, is to be considered, on account of such alteration, as an unstamped policy; and the contract which it purports to contain, as being on that account void; and the plaintiff therefore not entitled to retain the verdict he has obtained thereupon. There must therefore be a new trial.

Rule absolute.(1)

Williams v. Hedley.

8 East, 378. May 2, 1807.

Money paid by *A.* to *B.*, in order to compromise a *qui tam* action of usury brought by *B.* against *A.*, on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is *particeps criminis* with such compounding informer or plaintiff.

And such recovery may be had, although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money;) there being no evidence at the trial of this cause to shew that *A.* the present plaintiff was privy to that suit.

AFTER this case had been argued in the last term, upon a rule granted in *Michaelmas* term preceding to shew cause why the verdict, which had been obtained for the plaintiff at the trial before Lord Ellenborough at *Guildhall*, should not be set aside and a new trial had, by Sir *V. Gibbs* and *Wigley* in support of the rule, and by *Garrow*, *Marryat*, and *Laves* against it; the case stood over for consideration till this term, when the opinion of the Court was delivered by

LORD ELLENBOROUGH, C. J. This was an action for money had and received, brought to recover the sum of 965*l.* 0*s.* 8*d.*, as having been unduly obtained by the defendant from the plaintiff, under an agreement to compromise a *qui tam* action for penalties of usury, brought by the defendant against the plaintiff, on the ground of certain usurious transactions which had taken place between the plaintiff *Williams* and one *Eagleton*. This sum of 965*l.* 0*s.* 8*d.* was the amount of the debt which had been owing from *Eagleton* to *Hedley* and his partner: and the jury, to whom the question was left at the trial, found that the payment of this debt of *Eagleton* by the plaintiff to the defendant was obtained from the plaintiff under the terror of the above mentioned action of usury brought by the defendant, and then depending against

(1) Vide *French v. Patton*, 9 East, 350. S. C. at *Nisi Prius*, 1 Campb. 73.

him; and through the means of an agreement between the parties to compromise that action: and the plaintiff thereupon recovered a verdict against the defendant for the amount of the money he had so obtained from him. Upon the motion for a new trial two objections have been taken to the plaintiff's right to recover: the first was, that the plaintiff was *in pari delicto* with the defendant, as to the illegal compromise of the penal action; and on that account not entitled to recover. The second objection was, that as *Eagleton's* assignees had, after his bankruptcy, recovered this money against the defendant and his partner, as money received by them for the use of the assignees, the plaintiff could not now recover the money against the defendant: (a) the plaintiff having, as was contended on the behalf of the defendant, enabled *Eagleton's* assignees to recover that money from him and his partner, and thereby estopped himself now to recover it from the defendant. But as there was no evidence given at the trial of any act done on the part of *Williams* the plaintiff, in order to enable the assignees to recover, or which could be considered as rendering him in any degree privy to that suit, or liable for its consequences, that objection fell to the ground for want of its necessary foundation in point of fact. The first of these two objections is therefore the only one which remains to be considered. The answers given to it on the part of the plaintiff were, first, that the plaintiff, who was defendant in the action for usury, was not prohibited by the statute 18 Eliz. c. 5. s. 4, from agreeing to this composition, and paying the money which *Hedley* received under it; but that the prohibition and penalties of the statute, in this respect, solely attached upon and were confined to *the informer or plaintiff* in the penal action, "or other persons concerned in suing out process, making of composition, or other misdemeanor, contrary to that statute;" and did not attach upon or extend to the defendant, the person compounded with: in other words, that it was the object of the statute to punish and restrain the parties using such color, and availing themselves of the pretence of such offence, for the purpose of exaction, and not the party who was the object of such exaction. And such indeed, by comparing the language of the 4th sec. of this statute, by which the penalties are created, with the language of the 3d sec., by which the prohibition is declared, appears to have been the true sense and intention of the legislature. The "making composition," the "taking money, reward, or promise of reward for himself, or the use of another," which are made so highly penal in the party guilty of those offences by the 4th sec. of the statute, are misdemeanors contrary to the true intent and meaning of the act, as declared in the immediately preceding sections; in which the only offence specifically prohibited is the "*informers or plaintiffs* compounding or agreeing with any person or persons offending, or surmised to offend against any penal statute, &c.;" and not "*the being compounded or agreed with*, as a defend-

(a) So far as regarded this objection, the facts of the case on the motion for a new trial were stated to be these. *Eagleton* was indebted to several persons, and amongst others to *Eamer* and Co. in 965*l.* 0*s.* 8*d.* (the sum now recovered) and was arrested by them for that sum. The plaintiff *Williams* and *Clarence* his partner were bail for *Eagleton* in that action, and afterwards surrendered him into custody in discharge of themselves. *Eagleton* had disclosed to his creditors certain transactions between him and the plaintiff, which, if true, were usurious: in consequence of which a *qui tam* action was brought in the name of *Hedley*, the present defendant, against *Williams*; pending which the compromise in question took place; by virtue of which the sum of 965*l.* 0*s.* 8*d.* was, with the consent of *Hedley*, paid by *Clarence*, for *Williams*, to *Eamer* and Co. as for *Eagleton's* debt and as his money; and the proceedings in the penal action were gotten rid of by entering up judgment of nonsuit against the common informer for not proceeding to trial; and *Eagleton* was discharged as from *Eamer* and Co.'s suit. *Eagleton* however continued in custody at the suit of other creditors; and afterwards became bankrupt, in consequence of such imprisonment, as of a time before the payment of the money to *Eamer* and Co. This money the assignees recovered from *Hedley* the plaintiff in the *qui tam* action, as money of *Eagleton's* received by him to their use, and paid over by his authority to *Eamer* and Co. after *Eagleton's* bankruptcy.

"ant, in such information or suit." And in *Pie's* case, Hutton's Rep. 36, Lord *Hobart* considers this statute in the same point of view; viz. "as made for the ease of the subject, and for the avoiding and preventing of vexations by informations." Assuming, however, that the defendant, the person compounded with, is not within the express prohibitions and penalties of the act; it is still contended, that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute in question, it is so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he be not therefore to be considered as strictly in *pari delicto*,^(a) with the plaintiff, he is at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent money which he had paid him in the course and prosecution of their mutual crime.⁽¹⁾ But although this rule applies, (as was said by Lord *Mansfield*, in *Smith v. Bromley*, Douglas, 696, n.) "if the act be in itself immoral, or a violation of the general laws of public policy:" yet in the case of other laws, "which are calculated for the protection of the subject against oppression, extortion, and deceit;" Lord *Mansfield* lays down, that "if such laws be violated, and the defendant take advantage of the plaintiff's condition or situation, then the plaintiff shall recover." And in the case of *Browning v. Morris*, Cowp. 792, Lord *Mansfield* displays and enforces this distinction; and refers to the case of *Jaques v. Golightly* in C. P. before Lord Chief Justice *De Grey*, where the same principles were adopted by the Chief Justice in the determination of that case. In respect to the criminal offence of compounding, the plaintiff *Williams* was the person whose situation was taken advantage of by the other party to the composition: against which party the prohibitions and penalties of the statute of the 18 Eliz. are particularly levelled. It is no answer to this that *Williams* the plaintiff had been criminal in another matter, and towards another person, viz. *Eagleton*, in the usurious dealings with him; for that criminality was perfectly collateral to the offence of compounding now under consideration; and his very consciousness of those usurious dealings, and the dread of the consequences which might result therefrom, laid him more completely at the mercy of *Hedley*, and enabled him to effectuate the extortion which is the foundation of this action. Indeed, if the objection of *particeps criminis* were allowed to hold in its full extent, none of the cases above mentioned could have been determined: nor could the party paying usurious interest recover back the excess beyond legal interest, as he is constantly allowed to do;⁽²⁾ and which is particularly taken notice of and urged by Lord *Mansfield* in his judgment in the case of *Browning v. Morris*. Upon the authority, therefore, of the cases above cited, as applied to the facts of the case before us; and founding ourselves upon the distinction taken and relied upon in those cases in favour of the party for whose benefit the provisions of the law, which has been violated, were peculiarly made, and of whose situation advantage has been unduly taken; we are of opinion that this

(a) It was said by Lord *Ellenborough*, C. J. in the course of the argument, and seemed to be admitted by all, that when a plaintiff was in *pari delicto* with the defendant, money paid by the former to the latter could not be recovered back again; and that this was settled in *Houson v. Hancock*, 8 Term Rep. 575: which latter case, it was said by *Lawrence, J.*, overruled *Lacaussade v. White*, 7 Term Rep. 535. And he also observed that from what fell from Lord *Kenyon* in *Houson v. Hancock*, relative to *Lacaussade v. White*, it was evident that his lordship had considered the last mentioned case as an action against a stakeholder; in which he was mistaken. These and other cases upon the same point, such as *Vundyck v. Hewitt*, 1 East, 96. *Lubbock v. Potts*, 7 East, 456, and others cited in these, were referred to in the course of the argument.

(1) Vide *Tomkyns v. Barnett*, Skinn. 412. *Munt & al. v. Stokes & al.* 4 Term Rep. 561. *Pickard v. Bonner*, Peake's Ca. 221. *Norman v. Cole*, 3 Esp. 253.

(2) Vide *Bosanquet v. Dashwood*, Cas. temp. Talbot, 38. *Astley v. Reynolds*, 2 Stra. 915. *Fitzroy v. Gwoillin*, 1 Term Rep. 154.

action was, under the circumstances of this case, maintainable; and therefore that the rule for a new trial must be discharged.(1)

The King v. The Inhabitants of Axmouth.

8 East, 383. May 2, 1807.

A custom house officer, who was rated for his salary towards the land tax, and in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays.

TWO Justices by an order removed *Martha Clarke*, and her infant children by name, from *Azmouth* in the county of *Devon* to *Lyme Regis* in *Dorsetshire*. The sessions, on appeal quashed the order, subject to the opinion of this Court on the following case:

John Clarke, deceased, was settled at *Lyme Regis* in the year 1800, when he was appointed an officer under the custom house of that place, and, was stationed at *Azmouth* with a salary of 50*l*. On having this appointment he went to reside at *Azmouth*, and did the duty of his office there, and was charged 8*l*. per annum to the land tax in respect of his salary of 50*l*. until his death in 1806. There has been annually an order issued from the treasury, authorizing the commissioners to direct the collector of the out-ports to reimburse those officers of the customs, whose salaries do not exceed 60*l*. per annum, the taxes assessed on such salaries, and paid by them; and the order directs that especial care be taken that no more be allowed than has been or shall be paid by such officers. It most frequently, though not always, happened, that *Clarke* was unable to pay the tax assessed on him, until he had received the same from the collector of the customs; and the tax collector of the parish was at such times in the habit of trusting *Clarke* with a receipt; and in every case, whether he had actually paid the tax or not, *Clarke* used to take the receipt to the collector of the customs, who was never acquainted with the fact of the tax not having been previously paid, and received the amount of the tax; there having been annually the order from the treasury during *Clarke's* executing the office. And at those times, when he had not before paid it, he would in his return pay to the tax collector of the parish the amount of his tax. The receipts were always given in the name of *Clarke*, and were left by him with the collector of the customs, by whom they were transmitted to the board in *London*, with the quarterly accounts, and were there kept. *Clarke* died in *April* last, and after his death his widow, *Martha Clarke* the pauper, paid to the tax collector of *Azmouth* 2*l*. for a quarter's land tax due at *Christmas* 1805 on the salary of her deceased husband: which has been since again paid to her by the collector of the customs.

Disney, in support of the order of sessions, contended upon the authority of *Rex v. Okehampton*, Burr. S. C. 5, that this was a sufficient payment of the officer's share towards the public taxes or levies of the parish to gain him a settlement in *Azmouth*, within the st. 3 W. 3. c. 11. s. 6, although he were repaid by, or received the money beforehand from, the collector for this purpose. All the cases shew that the land tax is within the description of the act; and that it is sufficient if the officer be rated, and in fact pay it. So a tenant gains a settlement by being rated to and paying the poor's rate, or land tax; although such payment be allowed to him by his landlord out of the rent.(a) And he distinguished this from *Rex v. Weobley*; where though the exciseman was rated for his salary to the land tax, yet it was in fact paid by

(1) Vide *Taylor v. Lendey*, 9 East, 49.

(a) *Rex v. Openshaw*, ib. 522. *Rex v. Branley*, ib. 75. *Rex v. Chidingfold*, ib. 415, and *Rex v. Fulham*, ib. 480.

the collector, without any deduction from the salary. Lord Kenyon there said, that the exciseman neither paid it mediately nor immediately.

Harris, contra, relied on the latter case where Lord Kenyon laid stress on the circumstance, that the officer was not affected by the payment at all: that it was not deducted out of his salary, nor was his income diminished by the payment. Such was the case here. How then can it be said, that the officer paid his share towards the public taxes of the parish, when that which was paid was not paid out of his salary. But finding the opinion of the Court against him on this point; he attempted to shew that since the land tax redemption acts, 38 G. 3. c. 69, and 39 G. 3. c. 6, which perpetuate the tax on lands as a charge upon the lands in the parish, and leave the tax on salaries as a mere personal tax, the rating towards and payment of it, in respect of the latter, no longer satisfied the words of the stat. 3 W. 3. c. 11. But

The Court all agreed, that it was sufficient that it was still a public tax leviable and collected within the parish. That the whole tax, commonly called the land tax, was in the frame of it a personal tax; a certain proportion of which was to be raised in each parish in respect to the property of the several persons assessed; the first specified subject of the taxation being goods. The more there was raised on one fund, the less was left to be levied on another. The land was merely considered as a fund in aid of the tax; though in course of time, and for convenience sake, it came to be considered as the principal object of the tax, from whence it took its denomination. On the other ground

Lord ELLENBOROUGH, C. J. said that the question had been long ago decided in *Rez v. Okhampton*, which was in every point undistinguishable from the present case. The land tax being a public tax within the statute 3 W. 3. c. 11, the officer was both charged to it, and paid it within the parish: and nothing more was wanting to give him a settlement there. The case of the *King v. Weobley* was distinguished from the other cases by Lord Kenyon, because there the officer did not pay the tax mediately or immediately; and, as he says afterwards, because the pauper neither in fact paid the rate himself, nor constructively by the hands of his agent. But here he did in fact pay it himself. And as to his being reimbursed afterwards, all the cases agree that that makes no difference; and that is not contradicted by *Rez v. Weobley*.

Per Curiam,

Order of Sessions confirmed.

The King v. The Inhabitants of Bedworth.

8 East, 387. May 2, 1807.

Where a coal mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. *Aliter*, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner.

THE parish officers of *Bedworth* in *Warwickshire* made a rate, dated 15th of August 1806, for the relief of their poor, in which they assessed "*John Woodhouse* for a colliery, as of the annual value of 200*l.* at 5*l.*;" against which rate *Woodhouse* appealed; and the Sessions amended the same by striking out the assessment upon him in respect of the colliery; subject to the opinion of this Court on a case, stating, that Mr. *Woodhouse* appealed against the rate, assessing him for the colliery, as of the annual value of 200*l.* on the ground that long before and at the time of making the rate he had ceased to work, occupy or enjoy the colliery, and therefore was not liable to be rated for it. That by a lease, made the 16th of January 1777, the governors of the hospital of *Nicholas Chamberlain* of *Bedworth* demised all the mines of coal, iron stone, and other minerals lying under the lands therein described in the

parish of *Bedworth*, for the term of 42 years; yielding and paying to the said governors, during the said term, the clear yearly rent of 200*l.*, at the least and in all events, whatsoever the state of the said mines might at any time be, and whether any of the coal, &c. should be gotten or not. That *John Woodhouse* entered upon the mines, and continued to work the same till the 1st of *May* 1804: at which time all the coals within them were totally exhausted and worked out. That no evidence was given that there was any iron stone or other mineral. And that the mines ceased to be worked. That during the times the mines were worked, *J. Woodhouse* was rated for the same, in some years at a much larger amount than 200*l.* That from the time of his ceasing to work the said mines he was not rated till the making of the present rate.

The Court thought it necessary to hear *Wilson* and *Clarke* in support of the amended rate: and after *Reader* and *B. Morice* had referred to *Rex v. Parrott and Others*, 5 Term Rep. 593; where though the lessees of a coal-mine worked it at a loss to themselves, after paying their rent, they were still holden liable to be rated:

Lord ELLENBOROUGH, C. J. said; In that case the subject matter itself was profitable, and produced value to the owners, though the immediate occupiers derived no profit from it; all the net profits of the mine being absorbed by the sixth part of the gross value which they had covenanted to pay to the owners. But here the mine itself is exhausted, the subject matter of profit is gone, although the rent, which was no doubt calculated upon the probable average produce during the whole term, be still payable. The failure of the coal will not discharge the lessee's covenant to pay rent: perhaps he may have calculated upon that event; and may have received during the former part of his term an adequate value from the then produce of the mine to compensate the continuance of the rent to the end of the term. But with respect to the parish, he is only rateable for the concurrent annual(a) value during the period for which the rate is made; and when the thing which he occupies no longer affords any such concurrent value, the subject matter of the rating is gone.(1)

Per Curiam,

Amended Rate confirmed.

The King v. Buller and Another.

8 East, 389. May 2, 1807.

If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void.

THE defendants, the late mayor and deputy mayor of the borough of *Saltash* in *Cornwall*, were called upon by a rule to shew cause why a writ of *mandamus* should not issue commanding them to deliver to *J. Gaborian*, Esq. the present mayor, the mace, common seal, books, papers, and records, and the keys of the chest belonging to the borough. This rule was obtained upon an affidavit of *Mr. Gaborian*, stating his own election as mayor in *January* last, and a subsequent application to the defendants, who were in possession of the insignia, &c. of the office, and their refusal, and that he had been prevented from executing his office by one of the defendants claiming to act as deputy mayor under the other. And also upon an affidavit of the town clerk, stating that by charter of the 14 Geo. 3, the borough was incorporated by the name of the mayor and free burgesses, &c. That there should be seven capital bur-

(a) This was said with reference to the rate in question; which was for a year, and in which the party was rated for the annual value of the colliery.

(1) Vide *The King v. The Bishop of Rochester & al.* 12 East, 353.

gesses to be called aldermen, one of whom should be elected mayor, as therein mentioned. That on the death of an alderman, (all of whom were chosen for life) the mayor and the rest of the aldermen and free burgesses, or the major part of them, should elect and swear in one of the free burgesses inhabitants in his place. That on the 28th of *November* last, a *mandamus* issued to the mayor and the rest of the aldermen and free burgesses, reciting the death of one of the aldermen, and commanding them duly to assemble together in the *Guildhall* of the borough, &c. and to elect one of the free burgesses into the vacant office, and also that such of them to whom the same of right belonged should administer the oath of office to the person so elected. That in pursuance of that writ the mayor, aldermen, and free burgesses met, on the 18th of *December* last, at the *Guildhall*, for the purpose of proceeding to the election, in pursuance of a regular summons; when *P. Spicer* and *E. Hawkins* were proposed as candidates: but that before three votes had been given or tendered, *Mr. Hawkins*, in the presence and hearing of all present, admitted that he had not taken the sacrament. That *J. Buller* presided as mayor, and 4 other aldermen and 24 burgesses were present, out of whom 3 aldermen and 15 burgesses voted for *Spicer*, and the others for *Hawkins*. That *Spicer* was afterwards duly sworn in before *Gaborian* and *Drew*, two of the aldermen; in consequence of which they returned *Spicer* as duly elected, in answer to the *mandamus*. That by the charter, the mayor, aldermen, and burgesses, or the major part of them, on the charter-day in *September* for the election of mayor, are to assemble in the *Guildhall*: and being so assembled, the mayor and aldermen, or the major part of them, are to nominate and put in election for mayor two of the aldermen; and there continue together, or in due manner adjourn until the mayor, aldermen, and burgesses, or the major part of them, then and there assembled, shall have elected one of those two aldermen so put in election, for a year; and that before the mayor so elected shall be admitted to the execution of his office, he shall be sworn before the last mayor his predecessor, or, in his absence, before two other aldermen, to execute his office for a year, and until his successor be appointed. That a *mandamus* issued, on the 4th of *November* last, to elect and swear in a mayor; no election having been made on the last charter day: and in pursuance thereof, on the 20th of *June* last, the defendant *J. Buller*, then mayor and alderman, and six other aldermen, (including *Spicer*,) and 13 burgesses duly assembled at the *Guildhall* for the purpose of proceeding to the said election, when the mayor and two other aldermen nominated the two latter for mayor: and the other four aldermen (including *Spicer*) nominated *Hicks* and *Gaborian* (two of the four) for mayor. That after *Gaborian* had been so nominated, *Mr. Buller*, the mayor, and the two other aldermen in whose nomination he had joined, quitted the *Guildhall*; but the other aldermen and a majority of the burgesses before assembled continued together, and proceeded in the election, and elected *Gaborian* to be mayor for the year ensuing; who, in the absence of the last mayor, was then and there duly sworn in as mayor before the senior alderman present and presiding, and another alderman; and they accordingly returned him as elected mayor in answer to the writ. Notwithstanding which the defendant *Mr. Buller* still claimed to be mayor, and refused to deliver up the insignia, &c.

Garrow, *Dampier*, and *Abbott*, upon shewing cause against the rule, objected that upon the face of the relator's own affidavits it appeared that *Mr. Gaborian* was not duly elected mayor; for by the charter the then mayor is an integral necessary part of the elective assembly; and he having departed before any election made, it was not competent to the other members to proceed to make an election of the successor, but such election was absolutely void.

Park and *Pell*, on the other hand, contended, that the elective assembly having been once legally constituted for the purpose of the election, and the election having began, the assembly continued competent for that purpose

till the election was completed, notwithstanding the departure of the old mayor in the mean time.

The Court, however, considering that by the terms of the charter the old mayor who presided was an integral part of the body by which the election of the new mayor was to be made, were of opinion that it was necessary for the former to be present during the whole period of the election until it was completed. And that for want of his presence at the time when Mr. *Gaborian* was elected, such election was void. And therefore they discharged the rule. But at the sitting of the Court on the *Monday* following, one of the Judges intimated, that some doubt had occurred to them upon a case (a) which he had met with after the Court broke up on *Saturday*; but that being in a book of doubtful authority, they wished to make further inquiry concerning it before the matter was finally disposed of. And therefore the Court directed that their former order for discharging the rule should not be drawn up before the last day of the term; so that if they should not satisfy their doubt, the *mandamus* might go. Nothing further, however, being said upon it, the rule for the *mandamus* stood discharged.

Taylor v. The Royal Exchange Assurance Company.

8 East, 393. May 5, 1807.

Where a party obtains leave, by consent to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed.

UPON a rule for the master to review his taxation, who had, in taxing costs for the plaintiff, allowed him the costs of examining witnesses abroad on depositions, to which the defendants on a motion in court had consented in order to save the expence of a commission: the master upon reference to him, reported to the Court, that he was satisfied that he had proceeded upon a mistake: and that when a party applies for this indulgence, which is consented to on the other side, he virtually undertakes to examine his witnesses on depositions abroad at his own expence, and is not entitled to any allowance on the taxation of costs. *Garrow*, who was to have opposed the rule, acquiesced on hearing the master's report. And *Park*, on moving for the rule, said that the practice of the Court of Chancery was clear, that a party applying for a commission to examine witnesses on his behalf must pay the expences: and that unless this Court adopted the same rule, in respect to the party applying for leave to examine witnesses abroad on depositions, which could not be done without the other party's consent; such consent would never be given, but the applicant would be driven to the expence of applying for a commission.

Rule absolute.

(a) This was afterwards stated to be the case of *Rez v. Norris*, M. 4 Geo. 2. 1 Barnard. 385, when mention was made again of this case in the following term, upon a rule calling upon Mr. *Gaborian*, to shew by what authority he claimed to be mayor of *Saltash*; which rule was obtained by the Attorney-General, grounded upon the invalidity of the above-mentioned election. It was then also stated from the Bench, that no mention was made of this case in the MS. notes of that period; nor were the affidavits of it now to be found in the Crown-office. The rule against Mr. *Gaborian* was afterwards made absolute, without any further opinion expressed by the Court. [Vide the *King v. Gaborian*, 11 East, 77.]

Welch v. Nash.

8 East, 394. May 5, 1807.

Under the 19th section of the general highway act, 13 Geo. 3. c. 78, a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal stating the fact of a new road being set out in lieu of the old one. The defendant cannot justify, under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff.

IN trespass, the first count was for entering one close of the plaintiff called the *Shrubbery*, and another close formerly part of a public highway, in the parish of *Claines* in the county of *Worcester*, and for destroying the shrubs, &c. and breaking down and destroying the gates, and walls, posts, rails, and fences upon and round the said closes, and for carrying away and converting the same to the defendant's use. A second general count was, for the like trespasses for breaking down and destroying the gate, &c. of the plaintiff in the same parish, not laying them to be on the plaintiff's closes. Pleas, 1st, the general issue, 2dly, A justification to the several trespasses; that in, through, and over the several closes in which, &c. there was and yet is a public carriage highway; and because the said gates were wrongfully erected in the said closes and across the said highway, and obstructed the same, and the said walls, posts, rails and fences at the times when, &c. were wrongfully erected in, upon, and across the said highway there, and obstructed the same, &c.; the defendant, in order to open the said highway, committed the alleged acts of trespass and removed the materials to a small distance from the place where the same had been so wrongfully erected and stood as aforesaid, and left the same in a proper place for the use of the plaintiff. The replication joined issue on the 1st plea, and traversed the public highway pleaded in the second plea; and new-assigned that the defendant broke and entered the said closes and committed the several trespasses declared on for other purposes and on other occasions than those mentioned in the second plea, and out of the said supposed ways therein mentioned: and also for that the defendant committed the trespasses in a greater and more excessive manner and degree than was necessary for the use and enjoyment of the said supposed ways. The rejoinder took issue on the plaintiff's traverse of the public highway, and pleaded not guilty to the new assignment: upon which issue was joined. And at the trial before *Sutton*, B. at *Worcester Lent* assizes 1806, a verdict was found for the plaintiff upon the 1st and 2d issues, with 1s. damages; subject to the opinion of this Court, as to the 2d issue, upon the following case. And on the last issue a verdict was entered for the defendant: but if this Court should be of opinion that, as the pleadings stood, it ought to have been entered for the plaintiff, the verdict was to be altered accordingly, with 1s. damages.

The spot upon which the trespass (except as to the 3d issue) was committed was part of a public highway within the parish of *Claines*, in the hundred of *Oswaldslow*, branching out of the turnpike road which leads from *Worcester* to *Kidderminster*, and which part of the said highway, before it was stopped up, passed close by the gate at the entrance of the plaintiff's dwelling-house, and led into another highway called *Egg-lane*, about 275 yards from the entrance of the first mentioned highway. *Egg-lane* itself branches out of the turnpike road between *Worcester* and *Kidderminster*, nearer to the former place than the public highway so stopped up, and communicates with the upper part of that highway. (The course of the road stopped up and

the course of *Egg-lane* were delineated in a map annexed to the case, which was a copy of that enrolled at the Sessions with the proceedings.) On the 2d of September 1803, that part of the highway which passed by the plaintiff's gate, and led into *Egg-lane*, was stopped up by the authority of two justices, whose orders, together with all the proceedings respecting the said road, were duly enrolled by the clerk of the peace for the county of Worcester. The orders and proceedings enrolled are as follows: (These proceedings were all set out at length in the case. They were in substance,) 1st, the authority of the plaintiff Mr. *Welch* of *Hawford* in the parish of *Claines*, and of Mr. *Wall* of *Worcester*, the owners of the land described in the plan through which part of the road in question was described as *intended to be diverted and turned*, consenting to the making and continuing such new highway through their said lands. Given under their hands and seals the 17th of September 1803. The 2d, An order under the hands and seals of *T. B.* and *G. T.*, two justices of peace for the county of Worcester, stated to be made at a special Sessions holden at *Hawford* in the parish of *Claines* in the hundred of *Oswaldsloe* in that county; stating that "On Friday the 23d of September 1803, having, upon view, found that a certain part of a highway within the said parish of *Claines*, &c. branching out of the turnpike road leading from Worcester to Kidderminster, &c. in a north-eastwardly direction by the side of and close to the gate at the entrance to the dwelling-house of *Wm. Welch*, Esq. at *Hawford*, &c., and leading by the said gate in the same direction into *Egg-lane* in the said parish to a certain mill, &c. lying between that part of the highway which is by the side of and close to the gate at the entrance to the dwelling-house of the said *Wm. Welch* at *Hawford* aforesaid, and on other part thereof where it runs into and adjoins the said lane called *Egg-lane*, of the length of 480 yards or thereabouts, and particularly delineated and described in the plan annexed, may be *diverted and turned*, so as to make the same more commodious to the public; and having viewed a course proposed for the new highway in lieu thereof through the lands of the said *W. W.* and *S. W.* &c. both situate in the parish of *Claines* aforesaid, and along the said lane called *Egg-lane* to its entrance at the end thereof into the said turnpike road leading from Worcester to Kidderminster, of the length of 667 yards or thereabouts, and of the breadth of 14 feet, particularly described in the plan hereto annexed; and having received evidence of the consent of the said *W. W.* and *S. W.* respectively to the said highway being made through their said lands respectively hereinbefore described, by writing under their hands and seals: do hereby order the said highway to be *diverted and turned* through the said lands belonging to the said *W. W.* and *S. W.* and along the said lane called *Egg-lane* to the end thereof at its entrance in the said turnpike road." The 3d, An order of the same magistrates and of the same date, stating that they, being the justices who viewed the old and new highways described in the plan annexed, thereby-certified that they had viewed the new highway therein described, and that the same was fit for travellers. The 4th, An order of the same magistrates and of the same date, stating that they having "viewed the several highways described in the plan annexed, and made an order for *diverting the old highway*; and being satisfied that the new highway therein described is properly made and fit for travellers; did thereby order the said old highway, lying between that part of the said highway which is by the side of and close to the gate at the entrance of the dwelling-house of *W. W.* Esq. situate at *Hawford*, &c. and another part thereof where it runs into and adjoins *Egg-lane*, also situate in the parish of *Claines* aforesaid, of the length of 480 yards or thereabouts, and of the breadth of feet or thereabouts upon the average, as appears by the said plan, to be stopped up, and the lands and soil of so much thereof which lies between the said side of and close to the gate at the entrance to the dwelling-house of the said *W. W.* on the north-east corner of a shrubbery of

the said *W. W.* to be vested in the said *W. W.* whose lands adjoin thereto, in exchange for the land of the said *W. W.* and of *S. Wall* of, &c. taken for making the said *new* highway; the said *W. W.* having compensated and satisfied the said *S. W.* for the land belonging to him the said *S. W.*, so taken for making part of the new highway; and the said *W. W.* having also, at his own expence, completed the whole of the said new highway; and that the land and soil of the residue of the said road which lies between the north-east corner of the shrubbery of the said *W. W.* and the place where it runs into and adjoins *Egg-lane* shall be sold by the surveyor of the highways of the said parish of *Claines*, &c. Against these proceedings and orders the defendant appealed to the *Michaelmas* Quarter Sessions 1803; upon which appeal the proceedings and orders of the justices were confirmed. After this determination of the appeal, viz. at the time laid in the declaration, the defendant came with his servants to the place where the road had been stopped in pursuance of the order of the magistrates, and cut down twenty-one feet of railing which had been placed along the side of a field belonging to himself, from which, before the road was stopped up, he passed by a gate into the road in question. *He also cut down one of the posts to which the railing was fixed; which railing and the post stood in a ditch along the side of the defendant's field, the soil of which ditch belonged to the defendant, and formed no part of the road which had been stopped up.* On the part of the defendant it was proved, that at the time when the road which passed by the plaintiff's gate was stopped up, *the magistrates had only widened the course of Egg-lane, by throwing it into those several pieces of land (all on the right hand side of Egg-lane) given up by the plaintiff and Mr. Wall, as stated in the proceedings; but had not otherwise given it a new direction: the left-hand side of Egg-lane remaining as before, without any addition.* *Egg-lane*, though a carriage road before this alteration, was so narrow as to be inconvenient for carriages to go along it, and was in almost an impassable state, until it was put into complete repair by the plaintiff, at a considerable expence. He also proved that *Mr. Tuberville*, one of the magistrates by whom the order was made, though a justice of the county of *Worcester*, (as all justices are; none of them being appointed to particular hundreds;) and acting therein, *did not at that time reside within the hundred of Oswaldslow*; (a) and that though there were other acting magistrates residing within the said hundred of *Oswaldslow*, none of these were summoned, or received notices to attend the special sessions at which the several orders before stated were made by *Mr. Bund* and *Mr. Tuberville*. To this evidence adduced by the defendant the plaintiff's counsel objected; insisting that the orders of the magistrates, confirmed upon appeal by the Court of quarter sessions, were conclusive as to these matters; and that they could not be entered into in this action. *Mr. Baron Sutton*, however, received the evidence, subject to the opinion of this Court. The questions for the opinion of the Court were, 1st, whether the evidence adduced on the part of the defendant, and objected to by the plaintiff's counsel, were properly received. And if so, 2dly, whether the defendant were entitled to a verdict on the second issue. And 3dly, whether the plaintiff were entitled to a verdict on the last issue; the defendant not having justified cutting down and removing the post damage feasant on his land. This case was to be turned into a special verdict, if the Court should so direct.

Puller, for the plaintiff, contended, first, that the whole proceedings for turning the road, &c. having been confirmed on appeal to the quarter sessions, to which jurisdiction of the subject matter was given, the judgment of that court was conclusive upon the right of all parties; and its propriety could not be questioned in this action. It is insisted, however, that the 19th sect. of the general highway act 13 Geo. 3. c. 78, imposes as a necessary condition on

(a) This was considered, upon the argument, to be of no consequence: the statute is in this respect only directory.

the exercise by the magistrates of the power given to them of stopping up an old highway, that they should set out a new highway: and that here no new highway has in fact been set out, but only an old highway widened by the addition of detached pieces of the land adjoining to one side of it. But whether a new road has or has not been set out is purely a question of fact, and therefore like the question, whether more commodious or not to the public, more proper for the consideration of the sessions than for this Court. The same section of the act says, that it shall be lawful for any person aggrieved by any such order or proceeding to make his complaint thereof *by appeal* to the next sessions after the order made, who are authorized to hear and *finally* determine such appeal: and if confirmed on appeal, the inclosures may be made, and the ways stopped up: *and the proceedings thereupon shall be binding and conclusive to all persons whomsoever.* It certainly therefore was the intention of the legislature to give the sessions conclusive jurisdiction over some matters; and it is difficult to imagine any subject more proper for their consideration than the fact of a new road. All through the orders the new road is mentioned as contradistinguished from the old one: and it cannot now be inquired of, how the new road was made. In *Davidson v. Gill*, 1 East, 64, the order of the justices for stopping up the old, and setting out the new road, was defective upon the face of it, in not following the form prescribed in the schedule, which requires the length and breadth of the new road to be set out; which defect it was considered might be taken advantage of in a collateral proceeding. But here the proceedings are all regular upon the face of them. Supposing however that the setting out of a new road is an indispensable condition of the power of the magistrates to shut up the old road; and that the fact of setting it out is inquirable in a collateral proceeding; he contended that the widening of another old road, so as to make it more commodious to the public, would satisfy the provision of the act. [*Grose and Lawrence*, Justices, asked whether if there were two roads both narrow and inconvenient, leading to the same place, the magistrates could not order one of them to be widened, without stopping up the other: and referred to the 16th sect. of the act, which expressly gives them jurisdiction to widen roads which are inconveniently narrow, where the same may conveniently be done, without diverting them.] That section applies to a different case, where no consent is necessary of the owners of the lands over which the new road is to be turned. But the 19th sect. which gives the power of diverting an old road with such consent, does not in terminis impose it as a condition that an entire new road shall be made in lieu of the old one, throughout the whole course of it. Nor will the Court put so strict an interpretation upon the words when so much latitude of discretion was meant to be left to the Justices. And here there is a new road running parallel with the old highway along *Egg-lane*.

Lord ELLENBOROUGH, C. J. This is a question of jurisdiction: the magistrates have only jurisdiction conferred on them in a given case: they may *divert* an old road, so as to make it nearer or more commodious to the public; that is, by making a new road. The whole section contemplates that a new highway is to be made in lieu of the old one which is to be stopped up; and the magistrates can only order the old highway to be stopped up on the condition that a new highway has been made and put in a proper state. But what *diverting* or *turning* of the old road has there been in this case? or what new highway has been given in lieu of the old one which is stopped up? The facts are simply these; the magistrates have extinguished and stopped up one old road, and have enlarged another in different parts of it: but the *termini a quo* and *ad quem*, and the direction of it, remain the same as before. Increasing the width of one old highway is neither *diverting* another old highway, nor making a new one: and the justices cannot make facts by their determination in order to give to themselves jurisdiction, contrary to the truth of the case. There is the less reason too for saying that a new highway has been set out in lieu of the old one, because

Egg-lane has not been widened through its whole course, but the additions are only made in patches; so that if the old course of the highway there were stopped up, there would be no continuity of road in any other place in lieu of the other old highway which has been stopped up. Therefore, however desirous we may be of consulting the convenience of individuals in this respect, in a case too where we may reasonably conclude from the adjudication of the magistrates in sessions that the alteration is more commodious to the public; yet the words of the act are too strong to get over: and we cannot extend the jurisdiction of others any more than we can our own.

GROSE, J. declared himself of the same opinion; and referred to the 16th section, as pointing out the distinction between widening an old road; which is there provided for; and diverting the old and making a new road preparatory to stopping up the old one; which is provided for by the 19th section.

LAWRENCE, J. The justices cannot give themselves jurisdiction in a particular case by finding that as a fact which is not the fact. Suppose they had turned the road through a man's grounds, without his consent, would their finding the fact of his consent give them jurisdiction under this section when the act had given them none? Or suppose they had turned it through any of the excepted places, Vi. s. 16. The words of the 19th section are *divert* or *turn*; which certainly mean altering the direction of the road. Then all through it speaks of such *new* highway in contradistinction to the *old* highway; that means such *new* highway by the *diversion* or *turning* of the old one. The widening of *Egg-lane*, in different parts, which was a highway before, does not answer the description of a new highway in the 19th section. The 16th section affords a comment on the 19th, which it is difficult to get rid of; for the latter uses the words *diverted* and *turned*, as different from *widened* and *enlarged* in the former section.

LE BLANC, J. observed, that the fact did not support the argument.

PULLER then contended that the plaintiff was entitled to a verdict on the new assignment.

The Court said they were with him on that point; for that the defendant could not justify under the general issue the cutting the posts and rails of another, though put upon the defendant's own soil.

MARTIN for the defendant urged that if one fixed posts, &c. on another's land, he made them the property of that other: and referred to *Stead v. Gamble*. (a) But

The Court said, that was a case of costs, and not of pleading, and did not apply to the present. That here the defendant makes it part of his complaint, that the plaintiff had put his posts and rails on the defendant's land across the highway: and the case reserved shews that the posts and rails were meant to be stated as the property of the plaintiff: the cutting them therefore could not be justified under the general issue.

Postea to the plaintiff on the general issue to the new assignment; and a verdict to be entered for the defendant on the other issue.

(a) 7 East, 325. But it was no part of the question in that case whether a wrongful placing of the rails by a stranger in another's soil transferred the property in them to the owner of the soil.

The King v. The Inhabitants of Horsley.

8 East, 405. May 9, 1807.

A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect the residence for those 18 days with a residence by such next of the kin in the same parish for more than 40 days, after the death of the intestate and his widow, before such administration granted.

SARAH BARNFIELD, widow, a pauper, was removed by an order of two justices from the parish of *Horsley*, to the parish of *Avening*, both in the county of *Gloucester*. The sessions on appeal quashed the order, subject to the opinion of this Court on a case, stating that the pauper is the widow of *John Barnfield* who died in 1801, and was legally settled in *Avening*. That *W. Palzer* the father of the pauper *Sarah* died about Christmas 1802, intestate, possessed of a leasehold house in *Horsley* of 40s. per annum, for a term of years; leaving a widow, and the pauper, his only child whom he had by a former wife. That *W. Palzer's* widow died about a month after her husband. That upon the death of *W. Palzer*, the pauper his daughter, who had previously occupied the said leasehold house by permission of her father, continued to reside in it till the death of her mother-in-law, when she left the house, and let it to a tenant, who occupied it for three years from that time, and paid the rent for it to the pauper. That the pauper during this time, and until the date of the order of removal, resided with her family in *Horsley*. That on the 11th of Jan. 1806, the pauper obtained letters of administration to her father *W. Palzer*: and on the 29th of the same month, she sold and assigned her interest in the said premises to *W. Daniels*, who has ever since continued in possession.

Gaselee, W. E. Taunton, and *Lord*, in support of the order of sessions, contended, first, that the pauper, as sole next of kin of her intestate father (after the death of her mother-in-law) had such an equitable interest in the leasehold property, that by residing 40 days in the same parish she gained a settlement. In *Rez v. Cold Ashton*, Burr. S. C. 450, *Lord Mansfield* distinguished between the case of a sole next of kin, and where there were others entitled in an equal degree; that the former might gain a settlement by residing 40 days in the parish where the intestate's property was, before administration granted. And this distinction was recognized by *Lord Kenyon* in *Rez v. Offchurch*, 3 Term Rep. 117. The cases which have been determined against the settlement of the next of kin, are either where more than one were beneficially entitled under the stat. of distributions, although one only were entitled to take out administration; or where administration was not taken out at all; or at least, not taken out till after the interest in the premises expired in respect of which the settlement would accrue. Such were the cases of *Rez v. Widworthy*, Burr. S. C. 109. Andr. 4, and Cas. temp. Hardw. 392; *South Sydenham v. Lamerton*; (a) *Rez v. Lowey Swell*, Burr. S. C. 436; *Rez v. Northcurry*, Cald. 137, and *Rez v. Chew Magna*, Cald. 365. [A doubt was thrown out in the course of the argument, whether the pauper though sole next of kin to her father, were solely entitled in interest; for the representatives of the

(a) Cas. of Set. 95, from whence it is cited in Burr's Just. tit. Poor. tit. Settlement by Estate, and in chap. 10, of Const's Bott under the same title. 1 Stra. 57, reports the same case on a different point. 10 Mod. 388, states the point, but says that the Court gave no opinion upon it. Fol. 81, S. C. shows that it was the case of a sole next of kin.

mother-in-law would be entitled to her share. But it was answered that none other appeared on the case to be entitled, and the mother might in fact have had no next of kin, or she might have been a natural child, and so could not have any by law; or the pauper might have been her sole next of kin.] 2dly. They contended, that the letters of administration, which were in fact taken out 18 days before the removal, and while the pauper's interest in the premises still subsisted, (which distinguished the case from that of *Rez v. Widworthy*) had relation back to the death of the intestate, so as to vest in her the legal property of the term from that time. This is laid down in 1 Com. Dig. tit. Administration B. 10, which cites a case in C. B. M. 9 Ann. and 2 Rol. Abr. 554. l. 15 and 25, which latter books refers to 18 H. 6. 2. b. (with a *dubitatur*) and 36 H. 6. 8, and *Whittingstall v. Sir Miles Sands*. E. 11 Car. 1, which was affirmed in error. So, in ejectment by an administrator the demise may be laid before administration granted: for when granted, it will relate back and shew the title in the administrator from the death of the intestate. Here then the pauper has had both an actual possession, and, by relation, a legal title, if that be necessary, in the estate, for more than 40 days, during which time she resided in the same parish.

Phelps, contra, on the first point, said that this was not like the case of a cestuy que trust; for if so, it would make no difference whether there were one or more next of kin entitled to claim administration; but all the cases agreed that if there were more than one so entitled, no settlement could be gained by their residence on the estate; and though there were some dicta in favour of a sole next of kin; yet it had never been so decided; and the distinction could not be supported on principle: and as far as the point was in judgment in *South Sydenham v. Lamerton*, the decision is the other way. Strictly speaking, he said, no person was entitled as of right to administration; for it was in the discretion of the Ordinary to grant it even to a stranger, though there were other next of kin to the intestate; and it was still often granted to a creditor. [Lord *Ellenborough*, C. J. It is so much a claim of right in a sole next of kin, that if the Ordinary refused to grant administration to him, the Court will issue a *mandamus* to enforce it. And *Lawrence*, J. said, that there was a case in the books (a) of two next of kin, a widow and child; where though the Court refused to issue a *mandamus* to the Ordinary to grant administration to one of them in particular; yet they commanded him to grant it to one or other of the next of kin, leaving him to make the election amongst persons having equal claims. (b)] Then as to the point of relation; though the administration, when granted, may vest the property in the administrator as from the death of the intestate for the purpose of suit; yet it cannot have the effect of making the next of kin irremovable for a time past, when it must be admitted that she was removable, unless by reason of any equitable interest which as sole next of kin she might have in the premises. In fact, she was only irremovable, by reason of administration, for 18 days instead of 40. *Rez v. Widworthy* is in point to this part of the case.

The Court then said, that they had no doubt upon the last point: that the grant of administration could not operate by relation to make a person irremovable for a time past, who during that time was removable. But they would look into the cases upon the other point, in deference to the opinion intimated by Lord *Mansfield* in some of the cases as to a distinction in favour of a sole next of kin. And a few days afterwards

Lord *ELLENBOROUGH*, C. J. delivered judgment. This is the case of a sole next of kin exclusively entitled, after the death of her mother-in-law, to administration of the personal estate of the intestate, her father. And the question is, whether the pauper having, after she became such sole next of kin to the

(a) Vi. Anonymous, 1 Stra. 552.

(b) Vide *Fawcay v. Fawcay*, Salk. 36, and *Blackborough v. Davis*, ibid. 33 and vide 3 Salk. 21.

intestate, resided more than 40 days in the parish in which a leasehold tenement of 40s. per annum belonging to the intestate lay, thereby gained a settlement in that parish? This is not a settlement claimed, under the stat. 9 Geo. I. c. 7; the estate not having come to the pauper by purchase; but it is claimed on the mere ground of a 40 days residence in a parish, without being removable. The grant of letters of administration, though it may have the effect of vesting the leasehold property in the administratrix by relation, so as to enable her to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate; and though it may also render her liable to account for the rents and profits of it from the death of the intestate; yet it cannot operate by relation for a purpose perfectly collateral to the purposes above mentioned, and which is indeed, legally, an impossible one; viz. for the purpose of rendering her not removable at a time past, when, as far as the letters of administration are concerned, she was removable for want of them; and when any order which might have happened to be made for her removal, (as no letters of administration then existed,) could not, as was held in *Rex v. Widworthy*, be quashed afterwards upon the subsequent grant of them. It remains therefore to be considered, whether upon any other ground than the relation of the letters of administration to the death of the intestate, and the vesting of the leasehold property thereby in the administratrix, she can be held to have been irremovable during the former part of her residence prior to the grant of administration: which comes at last to this question, whether a person can, *for this purpose*, become the owner of a chattel real, which had belonged to the intestate, before the actual grant of administration to such person; It will be recollected, that, upon the death of her mother-in-law, the pauper became sole next of kin to the intestate: it was in her power, therefore, at any moment afterwards to have clothed herself exclusively with the legal character and rights of an administratrix. Lord Mansfield, in *Rex v. Cold Ashton*, observes that there is "a great difference between a sole next of kin, and where several persons in equal degree have all of them, (as in that case they had,) an equal right." In *Rex v. North Curry*, Lord Mansfield again observed, that the widow (the pauper in that case) "was not properly, and in the sense of the cases, the sole next of kin:" thereby intimating what would have been his opinion if the pauper had been sole next of kin. The effect however of a 40 days residence by a sole next of kin has never yet received a judicial decision. The circumstance occurred, indeed, in point of fact, in the case of *South Sydenham v. Lamerton*, 1 Str. 57; but it was argued and decided on a different ground. Adverting to the intimation given by other judges, of what would be their opinion upon such a case as the present, if it should come before them, and to the reason of the thing: according to which the exclusive right to enforce the proper means of acquiring a legal title to the property, coupled with the actual enjoyment of it in the mean time through the occupation of a tenant, gives so much colour of right to reside, without being removed; within the parish in which the property is situate, as to exempt such residence from being considered as a vagrant intrusion into a parish in which the party has nothing of *his own*, within the purview and scope of the poor laws; and to the determinations thereupon; we are of opinion, that in a case in which the language of no statute upon the subject precludes us from so determining; and where no principle of convenience, nor any decided case, is contravened by such a determination; we are well warranted in considering that a settlement was gained by a residence of 40 days within the parish in which a pauper, thus circumstanced in respect to real property there situate, resided; and of course, that the order of Sessions, discharging the order of removal, must be affirmed.

Birch v. Triste.

8 East, 412. May 9, 1807.

Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same Court is not a supersedeas of execution as the first is; and execution may then be sued out without leave of the Court. But in error of matter of fact *ceram vobis*, which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it.

LORD ELLENBOROUGH, C. J. delivered the opinion of the Court in this case: which had stood over some days for consideration.

This was a rule obtained early in this term, on the part of the defendant, calling on the plaintiff to shew cause why the execution issued and executed in this cause should not be set aside, on the ground that the same was irregular; it having been sued out after a writ of error allowed and bail put in: or if the Court should be of opinion that, under the circumstances, the writ of error was not a supersedeas, still that the plaintiff ought not to have sued out execution without having first applied to the Court for leave so to do. On shewing cause against the rule the facts appeared to be these: that the defendant in *Michaelmas* term last sued out a writ of error on a judgment obtained against him in this Court; and had the same allowed, and served it on the plaintiff; but having failed in perfecting his bail in error in time, he afterwards nonprossed his own writ of error; and then sued out a new writ of error, got the same allowed, and perfected his bail: and afterwards the plaintiff, not regarding this second writ of error, issued his execution on the judgment, without applying to the Court for leave. As to the first point, no authority has been shewn that a second writ of error sued out *in the same Court* has ever been held to be a supersedeas, where the first writ of error abated, or was put an end to by act of the party, the plaintiff in error. On the contrary, there is a settled distinction between the case of a writ of error abating by act of the party, and of one abating by the act of God, or by a circumstance, which the plaintiff in error could not controul: in the first case, the plaintiff in error shall not by means of a second writ supersede the execution of his adversary; for that would be to enable him at his own pleasure to prolong the delay: in the latter case it is reasonable that he should not be prejudiced where he has not been guilty of laches; as where the writ has abated by death of the party, or of the chief justice. Several authorities warrant this distinction. In Sir Francis Duncombe's case, 1 Mod. 285, it was held, that if a writ of error abate in parliament, or the like, and another writ of error be brought in the same Court, it is no supersedeas. *Hartop v. Holt*, 1 Salk. 263, is to the same purpose. There after writ of error in the Exchequer Chamber, on a judgment in debt in the King's Bench, and that judgment affirmed, the plaintiff sued out a *sci. fa.* in B. R., and had an award of execution; on which the defendant brought a writ of error in the Exchequer Chamber, *tam in redditione judicii, quam in adjudicatione executionis*: notwithstanding which the plaintiff went on, and sued out execution. And a motion was made to set it aside, because it was sued out when there was a writ of error depending. And by *Holt*, C. J. there can be no new writ of error after the justices and barons have affirmed or reversed. If a plaintiff in error be nonsuit, he shall not have a new writ of error. And the Court held that what the plaintiff had done was well, and no contempt; for the writ of error could be no supersedeas to the execution. In *Buller v. Lusitano de Pinna*, 2 Stra. 880, a writ of error brought by a feme sole abated by her marriage; and then she and her husband brought a second: and the Court gave leave to take out execution; it being a delay occasioned by the act of the plaintiff in error. The case of *Jenkins v. Bates* is very shortly reported in 2 Str. 1015; but we have seen a

fuller note of it to the same effect from Mr. Ford's MS. According to that note it appears, that the plaintiff brought a writ of error on a judgment in C. B. as a feme sole; and the defendant sued out a sci. fa. to assign errors; which were assigned by the plaintiff and her husband. The defendant pleaded in *nullo est erratum*; and then moved for leave to take out execution; insisting that by the marriage the suit was abated. The plaintiff insisted, that though the suit were abated, yet the Court should give time to bring a new writ of error, which would be a supersedeas to the execution. The Chief Justice said, the abating the writ is the act of the party: here is nothing to hinder the defendant from taking out execution: and as the plaintiff has voluntarily defeated her own writ, she may thank herself, and the defendant must take out execution. These authorities have settled the point, that a second writ of error brought in the same Court is not a supersedeas, as the first is. The remaining question is, whether, that being so, the plaintiff below be obliged by the practice of the Court to apply to the Court for leave to take out execution? And if it be clear, as we think it is, that after the first writ of error has been put an end to by the act of the plaintiff in error, he cannot supersede or stay the defendant's execution by a second writ of error brought in the same Court; there is no reason to oblige him to apply to the Court for leave to sue out his execution: which can only occasion further expence and delay, and may tend to deprive the original plaintiff of the fruits of his judgment: although in a questionable case it may be a prudent measure for the defendant in error to apply to the Court for leave before he sues out his execution. In *Lane and others v. Bacchus*, 2 Term Rep. 44, the Court refused to set aside an execution sued out before, but executed after, the allowance of a writ of error served on the sheriff and the party; the plaintiff in error not having regularly put in bail. In error of matter of fact *coram nobis*, which is not within the statutes requiring bail in error, the writ of error is not of itself a supersedeas in the first instance; but is or is not so according to circumstances; and those circumstances the Court will inquire into, on motion for leave to take out execution: in case therefore of error brought *coram nobis*, the practice is that the defendant in error shall move the Court for leave to take out execution. That is so laid down in *Ribout v. Wheeler*, Sayer, 166. It was a motion to set aside a *feri facias*: a writ of error *coram vobis* had been brought, and allowed, and notice of the allowance served on the plaintiff's attorney before the *feri facias* sued out; which was sued without leave; and which writ of error was not determined. The Court made the rule absolute. And *Denison*, J. said, (*Ryder*, C. J. and *Wright*, J. absent,) before a writ of error *coram vobis*; it not being a writ of right, is allowed, there must be an affidavit of some error in fact; by which, in case the fact to be assigned for error is true, the plaintiff's right of action will be destroyed. A writ of error *coram vobis* is not a supersedeas in itself: (a) but although it be not, execution cannot be taken out on the judgment whilst it is depending, without leave of the Court. It would be very unreasonable that it should be in the power of the plaintiff to take out execution upon the judgment, without leave of the Court, whilst a question is depending concerning a fact, by which, if it be true, the plaintiff's right of action will be destroyed. This reasoning does not apply to the case of a writ of error within the statute, where the plaintiff has had, or might have had, the benefit of it as a supersedeas, but for his own act in determining it. We are therefore of opinion, that there is not any irregularity in the suing out of the execution, and that the rule obtained for setting it aside must be discharged.

Rule discharged.

(a) Vide Carth. 368, 9.

The King v. Palmer and Another.

8 East, 416. May 11, 1807.

Although a parish might not have had the benefit of the stat. 43 Eliz. c. 2, before and at the passing of the stat. 13 & 14 Car. 2. c. 12; but perhaps at that period, and certainly for a long course of years antecedent to the years 1773-5 maintained its poor in separate districts; yet it was competent to the parishioners at the latter period to cease acting under the statute of Car. 2, and to recur to the general provision of the stat. 43 Eliz. by maintaining their poor as one entire parish; and having so done from the year 1775, the Court refused a *mandamus* to the justices of peace to appoint separate overseers as before that time.

A *MANDAMUS* was prayed for to the defendants, justices of the peace for the county of *Wilts*, commanding them to appoint two or more overseers of the poor within that part of the parish of *Wokingham* which lies in *Wilts*: the object of which was to bring in revision the opinion of the Court pronounced in the case of *Lane v. Cobham*.^(a) The affidavits in support of the application stated, that the parish of *Wokingham* is about 5 miles in length, 3 in breadth, and 18 in circumference: situated in the counties of *Wilts* and *Berks*, and subdivided into the corporate town of *Wokingham*; in *Berks*, the *Berks* liberty, and *Wilts* liberty, without the corporation; each of which three districts had (previous to 1774) immemorially maintained their own poor separately, with separate overseers, rates, and accounts. That there had been removals of paupers from each of these districts to the other, and certificates from one to the other now existing from 1696 to 1772. That there is one church only, which is situated in the *Wilts* liberty; but three churchwardens, one out of each district, appointed at the consistory court of the dean of *Salum*. That two constables are appointed for the town of *Wokingham* by the corporate magistrates in Sessions, according to their charter; one constable for the *Berks* district, appointed at the court leet for the hundred of *Sonning* in *Berks*; and another constable, by the *Wilts* magistrates in Sessions, for the *Wilts* district. That previous to 1774 there were always appointed two overseers for the town, two for the *Berks* liberty, and either one or two for the *Wilts* liberty: but about that time the town and the *Berks* liberty agreed to have only three overseers between them, two for the one and one for the other, alternately in each year; and since that time only one overseer has been yearly appointed for the *Wilts* liberty. That in 1774, a *mandamus*^(b) issued to the churchwardens and overseers of the parish of *W.* in *Berks* and *Wilts*, to make one equal and entire rate; which was never argued: since which a joint rate has been made for the "town and parish of *Wokingham*," as the rates are entitled; but still the overseers in each district continue to collect their several proportions of the rate separately, and keep separate accounts of their expenditure, and confine their relief to the poor in their respective districts. That the *Wilts* liberty is a township, and has never had jointly with the other two districts the benefit of the stat. 43 Eliz. c. 2. It further appeared, that the town was incorporated by two charters, one of the 25th of Elizabeth, granted to the town of *Wokingham* in the county of *Berks*; the other of the 10th Jac. 1, to the town of *Wokingham* in the counties of *Berks* and *Wilts* in our lordship of *Sonning*. That the *Berkshire* part is in the hundred of *Sonning*, and the *Wilts* part of *Wokingham* in the hundred of *Amesbury*. That amongst the corporation muniments, in the custody of the town clerk, are many bonds of indemnity granted by individuals to indemnify the several divisions of the parish from probable charges: six of them dated from 1613 to

(a) 7 East, 1, where the same question arose as in the present case.

(b) It was stated by mistake in *Lane v. Cobham*, that the form of the mandamus was to the justices to appoint four overseers for the whole parish; but the legal inference, as it applied to the argument, was the same.

1640(a) are made to indemnify the town and parish of Wokingham in the counties of Berks and Wilts. Sixteen of them, dated from the 43 Eliz. to 1716, are to indemnify the town and parish of Wokingham in the county of Berks; two bonds, dated in 1657 and 1698, are to indemnify the parish of Wokingham in the county of Berks; and eighty-two bonds dated from 1606 to 1773 are to indemnify the town of Wokingham only; of which latter some are granted to the alderman of the town; others to the alderman and overseers of the town. That there are many certificates granted by each of the three districts to one of the others; in some of which the fact of their maintaining their poor separately is stated. Nine of these from 1705 to 1760 granted by the churchwardens and overseers of the poor of the corporation of Wokingham, in the county of Berks, to the churchwardens and overseers of the poor of Wokingham in the county of Wilts. Fourteen others from 1705 to 1748, from the churchwardens and overseers of the poor of the parish of Wokingham, in the county of Berks, to the churchwardens and overseers of the poor of the parish of Wokingham in the county of Wilts. Four others from the parish of Wokingham, in the county of Wilts, to the town of Wokingham in the county of Berks, dated from 1706 to 1764. And two others from the parish of Wokingham in Berks, dated 1705 and 1748. And also an order of removal from the Berks to the Wilts part of the parish, confirmed on appeal in the 12th of Anne, was set forth. That prior to 1774, according to information and belief, the three districts maintained their poor separately by separate rates, of which one was specifically referred to as far back, as 1725, and others afterwards. And that the parish has always been subdivided, and has not had the benefit of the stat. 43 Eliz. c. 2; and that the Wilts part maintained its own poor separately at the time of passing the stat. 13 & 14 Car. 2. c. 12.

The affidavits in answer to the rule stated in addition, that the Wilts part of the parish, consisting of about a fourth, was an insulated part of that county, about 40 miles distant from the body of it, in which part the only parish church was situated; and the whole parish is within the jurisdiction of the Dean of Sarum. That by the information of old persons now dead (one of them above 40 years) the whole parish had formerly maintained their poor jointly; but had been separated into three districts by the influence of three leading men, (one of whom was mentioned); and so continued till it was united again in 1775, after the granting of the *mandamus*. That the following entry appears in the parish books: "July 11th, 1775. At a meeting of the parishioners of the Wilts part of the parish, held this day in the vestry of the parish church, we the undermentioned persons do consent and agree to become one parish with the town of Wokingham and the Berkshire part of the parish, and, to give up an equal proportion of the money now in hand to the other respective overseers for the use of the year ensuing." (Signed by several of the inhabitants.) That since July 1775, one general rate has been made for the whole parish; and it has been customary for the respective officers to collect such portion of rates as were charged in the district for which they had been respectively appointed, and to pay the poor residing in their respective districts who required occasional relief: but from that time there has been one general poor house or work house for the use of the whole town and parish, which has been maintained by each of the respective overseers of the several districts, alternately, for a month at a time; except that the Wilts part being the smallest, the other two have generally paid the rent for the poor house, and provided the linen, furniture, and fuel for the same. That the overseers within each district have kept separate accounts, which are regularly entered in the parish books; and

(a) The particular dates of these appeared by the affidavits against the rule to be the 19th May 1613. 13th March 1637. 4th January, 13 Car. 1. 6th April 1639. 1st November, 14th Car. 1; and 11th July 1640; the last five of which were made to the alderman of the town.

at the end of each year have regularly accounted to each other, and have paid over each to the other the balances as their accounts required; the town overseers generally receiving a considerable balance from the other districts on account of the excess of expenditure beyond the amount of rates collected within that district. That a rate of 1s. in the pound averages in the town 80l., in the *Berks* district 130l., and in the *Wilts* district 58l.; and that the whole town and parish have reaped the benefit of the stat. 43 Eliz. c. 2, from 1775 to the present time, and that it may continue so to do.

The affidavits further stated, that in an ancient MS. book, intitled *Wokingham Sessions Book*, found amongst the muniments of the corporation, containing entries of the Quarter Sessions from 1630 to 1748, there is this entry: "*Berks*, ss.—At a session of the peace held at *Newbury*, in the said county, on the 3d of *April* 1638, upon the petition of the alderman, burgesses, and other inhabitants of *Wokingham*, shewing that at the Quarter Sessions, holden at *Newbury* on the 6th of *October* 1635, it was ordered, that all the inhabitants of *Wokingham* aforesaid, as well those within the liberty of the town as those of the parish, should join together in all taxes and rates for the relief of the poor; which the inhabitants of the parish do utterly refuse to do: now, upon the petition of the said alderman, burgesses, and inhabitants, shewing that the parishioners of the said parish without the said borough do make such refusal as aforesaid; it is ordered in open court, that the said former order be confirmed. And if the said inhabitants of the said parish without the said borough do refuse to join with the inhabitants of the said borough towards the relief of the poor of the said parish, the next justice of the peace is desired by the Court to bind them over to the next Sessions to answer their contempt therein." (Signed by the clerk of the peace). That a separate rate made for the relief of the poor of the *Berks* part of the parish in 1772 was quashed by the county Quarter Sessions at the *Epiphany* Sessions 1773 on appeal; on the ground, as was believed, that the rate was not made for the whole parish. And that it was quashed for that reason; and that the question whether the parish could have the benefit of the stat. 43 Eliz. c. 2, was then fully discussed, was believed, because it so appeared by one of the briefs held by the counsel for the appellants at the Sessions which was now produced in court out of the custody of the grandson of the then appellant's attorney in the cause. And from the statement in that brief it appears that much evidence then existed respecting the whole of the parish having formerly been rated together, which does not now exist: and it is there stated, that the first separation was in 1643. That since the mandamus in 1774 a rate has been made for the whole parish; but it has been the practice of the overseers within the respective jurisdictions to take bonds of indemnity to themselves alone, without naming the other overseers. There were also various entries stated in the affidavits of the proceedings of the inhabitants of the parish in respect of the appeal; the result of which appeared to have ended in an agreement between the town and the *Berkshire* part after the separate rate of the latter had been quashed at the Sessions to unite in making a joint rate in future; and an invitation by them to the *Wilts* part to join them, which was after some time acceded to, as before stated.

Garrow and *Dampier* shewed cause against the rule, and argued upon the evidence, as preponderating in favour of the supposition that the inhabitants of the three districts acted as one parish at the time of passing the stat. 13 & 14 Car. 2. But that whether they did so or not was immaterial, if it appeared now that they were capable of enjoying the benefit of the stat. 43 Eliz.; which they said was sufficiently evident from the fact of their having enjoyed that benefit for the last 30 years. That the words of the stat. of Charles 2, reciting, that the inhabitants of several counties, by reason of the largeness of their parishes, "have not, nor cannot," reap the benefit of the 43 Eliz., looked prospectively, as well as to the time past. And that it was competent to a

parish at any time when it found it expedient so to do, to revert to the general mode of providing for its poor pointed out by the 43 Eliz. : although at some antecedent period it might have provided for them in separate vills under the 13 & 14 Car. 2.

The Attorney-General and Park, in support of the rule, argued upon their view of the evidence, as confirming the supposition that the parish had always maintained its poor in separate districts down to the year 1775, and that they could not have the benefit of the stat. 43 Eliz. ; and in effect never had received it ; since even now the overseers divide their labours according to the several districts. That the stat. 13 & 14 Car. 2, meant to legalize the practice of those parishes which before and at that time maintained their poor in separate districts ; and was not intended to operate prospectively ; still less to authorize a fluctuating system of providing for the poor, either in districts or as an entire parish, according to the shifting opinions of the day ; which must necessarily be attended with great inconvenience. And that if a parish had once begun to act, as this parish had done for a long course of years both before and at the time of passing the stat. 13 and 14 Car. 2, under that act, it was not competent for the inhabitants by any agreement to revert back again to the provisions of the stat. 43 Eliz. ; even if it appeared, which they contended it did not in this case, that they might conveniently maintain their poor, as one entire parish. And they cited Lord *Kenyon's* opinion in *Rex v. Leigh*, 3 Term Rep. 746, and other cases there referred to.

Curia adv. vult.

Lord ELLENBOROUGH, C. J. now delivered judgment. This was an application for a *mandamus* to appoint separate overseers for the three several districts and divisions within the parish of *Wokingham*, in the several counties of *Berks* and *Wilts*, under the stat. 13 and 14 Car. 2. c. 12. s. 21, upon the alleged ground, that the inhabitants of that parish "*had not nor could*" reap the benefit of the stat. 43 Eliz. Whether the parish had or could have the benefit of the stat. 43 Eliz. at the time of the passing of the stat. 13 and 14 Car. 2, appears doubtful upon the evidence laid before us in the affidavits on both sides. From the bonds of indemnity given by one part of the parish to another during the early part of the 17th century, prior to the year 1638, it is clear that the whole parish did not then maintain its own poor jointly and *as a parish*. In the year 1638, which is a period nearest to the year 1662, the date of the stat. 13 and 14 Car. 2, it appears that the sessions made an order for a joint rate : and if that order were obeyed, (as in the absence of contrary evidence it may be presumed to have been,) the mode directed by the stat. 43 Eliz. was more likely to have been acted under at and immediately after the time of passing the statute of Charles, than any other less authorized mode of maintaining their poor. But supposing it were otherwise in point of fact, and that the parish at the time of passing the statute of Car. 2, was not in a situation conveniently to reap the benefit of the stat. 43 Eliz. i. e. by a joint parochial rate for the maintenance of all its poor, under the joint management of not more than four overseers in the whole ; and supposing the poor to have been immediately *thereafter* maintained in three separate districts and divisions, as it is now sought that they should be ; the question is, whether it were not competent to the parish, if they found it more convenient so to do, to cease acting under the stat. of Charles 2, and to recur to the provisions of the stat. 43 Eliz. There is nothing in the language of the act which imports that parishes were in this respect then immediately to adopt that mode of maintenance for their poor from which they should not afterwards be at liberty to depart. No decided case has excluded this provision from receiving a prospective construction. The words "*have not*" were of themselves sufficient to cover any then actually existing case in which parishes did not reap the benefit of the stat. 43 Eliz. The word "*cannot*," though in its strictest grammatical sense it applies properly to present time, yet familiar instances occur in which the word is

used prospectively: and as the varying circumstances of parishes may make the provisions of the statute of Car. 2, as necessary in respect to future cases, as those which existed at the time of passing the act, we think sound construction requires that it should be deemed applicable to both descriptions of cases. The language of Lord *Kenyon* in *Rez v. Leigh*, 3 Term Rep. 746, which goes furthest on this head, is rather applied to the expedient exercise of the discretion of the Court, than to its legal power in this particular. Speaking of the time of passing the statute of Car. 2, he says, "if the parish were properly divided at that time, nothing which has happened since will induce us to make any innovation." And *Buller*, Justice, in the same case, considers the discretion of the Court, in assisting parishes to act under the one statute or the other, as fit to be governed by considerations of convenience and policy, and not as concluded or bound down by the actually existing practice at or immediately after the passing of the statute of Car. 2. According to the construction of the statute now adopted by us, the word *cannot* must be read as *may not*: and the words "shall after the passing of this act be maintained" &c. must be understood, not merely as imperative in respect to the then existing cases, but as applicable to other parishes also, which in future might be similarly circumstanced; and as ceasing to be imperative when any parish might reap the benefit of the stat. 43 Eliz. Considering it therefore as a question open for our discretion, whether we will grant a *mandamus* for the purpose of introducing a different mode of managing the maintenance of the poor than that which has obtained in this parish, without all question, for the last 32 years, and probably even at and after the time of passing the statute of Car. 2; we cannot in this case discover any such preponderating reasons of convenience or policy as should induce us in the exercise of a sound discretion so to interfere: and in the absence of such reasons, we think that the rule *nisi* which has been obtained in this case should be discharged.

Hawkes v. Hawkey.

8 East, 427. May 11, 1807.

In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken:) and then alleged that the defendant said of him that he was *forsworn*; innuendo, that the plaintiff had *perjured* himself in what he had sworn in his *aforsaid answer to the bill so filed against him*: held that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in.

THE plaintiff declared in slander; and after the usual prefatory allegations of his prior good conduct and reputation, stated that before the speaking and publishing of the false malicious and defamatory words in the four last counts mentioned, he had in due manner put in his answer upon oath to a certain bill filed against him in a Court of Exchequer, by the defendant, and that he had never been guilty, nor until the speaking and publishing the defamatory words, &c. had been suspected of perjury, &c. Then in the 5th and 6th counts on which the question arose, the plaintiff declared, that the defendant further intending, &c., in a certain other discourse which he had with one R. W. the plaintiff's servant, falsely and maliciously spoke and published to the said R. W., of and concerning the plaintiff, in the presence and hearing of divers other subjects, &c. these words: *I (the defendant) have no doubt you (R. W.) will forswear yourself, as your master (the plaintiff) has done before you (R. W. ;) (meaning and insinuating thereby that the plaintiff had perjured himself, in what he had sworn in his aforsaid answer to the bill so filed against him as*

aforsaid.) The 6th count laid the words spoken by the defendant to the said R. W., the plaintiff's servant, thus; *your master (meaning the plaintiff) has both cheated people out of their wages and forsworn himself; (thereby meaning and insinuating that the plaintiff had perjured himself in the aforsaid answer so put in by him to the bill so filed against him as aforsaid;)* by means of which scandal the plaintiff had been suspected, and believed to be guilty of perjury, and divers had refused to have any dealing, &c. with him as before, &c. After verdict for the plaintiff, with general damages.

Owen moved, in last Michaelmas Term, in arrest of judgment: 1st, in respect to the charge of being *forsworn*; that although it is stated in the prefatory matter that the plaintiff, before the slanderous words spoken, had put in his answer upon oath to a bill filed against him in the Court of Exchequer; yet there is no colloquium or introductory averment that the words were spoken of him with reference to any judicial proceeding; without which the words themselves, according to *Holt v. Scofield*, 6 Term Rep. 691, are not actionable. And this defect cannot be supplied by the *innuendo*, (meaning that the plaintiff had perjured himself in what he had sworn in his *aforsaid answer* to the bill so filed against him as *aforsaid*;) for the office of an *innuendo* is only to explain, but cannot enlarge the meaning of the words spoken, without the aid of an introductory averment. *Rez v. Horne*. (a) 2dly. That the same objection applied to the 6th count: the imputation of cheating people out of their wages is not actionable, without an averment that the words were spoken of the plaintiff in his trade or profession, or shewing some special damage. *Davis v. Miller*, 2 Stra. 1169, and *Todd v. Hastings*, 2 Saund. 307.

Sir V. Gibbs and Marryat shewed cause, and contended that the words spoken were connected with the introductory matter by means of the *innuendo*; which differed this from the other cases cited, where there was no introductory matter to which the *innuendo* could apply. The *innuendo* did not introduce the new matter, but only referred to it; which was the proper office of such an *innuendo*. If upon the evidence it had appeared that the words spoken had no reference to the plaintiff's answer filed in the Exchequer, the *innuendo* would have been disproved, and the plaintiff could not have recovered. But though the reference of the slanderous words to the plaintiff's answer in the Exchequer may be informally stated in the declaration, the informality is cured by the verdict. For in order to support the verdict it must have been proved, pursuant to the allegations of the declaration, that there was such a bill filed in the Exchequer, to which the plaintiff had put in his answer on oath; that the words laid were spoken, and that they referred to that answer; without which the *innuendo*, that by such words, with reference to such answer, the defendant meant to insinuate that the plaintiff had perjured himself, would not have been proved. And it was not necessary to state a colloquium; because, it would not have been necessary to have proved it in fact. It is sufficient, after verdict, if the words may mean what the *innuendo* imputes them to mean, with reference to the introductory matter stated on the record. In the case of *Savage v. Roberts*, Salk. 694, the words spoken were not actionable, unless spoken of the plaintiff in his trade; and that could not be inferred from the mere circumstance of calling himself a *trader*: but here the words are actionable if spoken with reference to a suit in Court; and there is an introductory averment that there was such a suit; and the *innuendo* contains an averment that they were spoken of that suit. They mentioned also *Tindal v. Moore*, 2 Wils. 114, where no colloquium was thought necessary.

Damncey and *Owen*, in support of the rule. The cases before cited shew that the words themselves are not actionable, unless by proper averments they

(a) Cowp. 684, referring to *Barham's case*, 4 Rep. 30. a.

are shewn to impute perjury in some cause in Court; for which purpose four links are necessary. 1. The fact of such answer upon oath by the plaintiff to the bill filed in the Exchequer. 2. That there was a colloquium about it: with reference to which the words were spoken. 3. The words themselves. 4. The innuendo that the defendant meant by those words to impute perjury to the plaintiff, in that answer which he had put in, and concerning which the colloquium was had. It is not enough that there was such a judicial proceeding; but it must expressly appear by a distinct averment upon the record that the words were spoken with reference to that judicial proceeding; and not by way of innuendo, which need not be proved: and the jury cannot find that fact unless it be judicially submitted to them. This is expressly laid down in *Rez v. Horne*, Cowp. 684, &c. And in *Ludwell v. Hole*, 1 Stra. 696; *Davis v. Miller*, 2 Stra. 1169, and *Holt v. Scholefield*, 6 Term Rep. 691, judgment was arrested for want of a colloquium. It may be said however, that in the last mentioned cases there was no introductory averment to which the innuendo could refer: but that will not apply to *Savage v. Robery*, Salk. 694; for there the plaintiff averred that he was a trader; but for want of a colloquium that the words were spoken of him in that character, without which they were not actionable, the judgment was arrested. The innuendo in this case enlarges the natural sense of the words spoken; which it cannot do without the aid of an averment to introduce the new matter, and a colloquium to refer the words spoken to such new matter; and the innuendo is no averment in itself. They also referred to *Rez v. Greepe*, Salk. 513, and 1 Lord Ray. 256; *Thomas v. Azeworth*, Hob. 2; *Miles v. Jacob*, ib. 6; *Harvey v. Duckin*, ib. 45, and *Fleetwood v. Curley*, ib. 268; in which latter there was an averment that the king had made the plaintiff general receiver of the court of wards, and that the defendant spoke certain words of the plaintiff, charging him with deceiving and cozening the king: but there was no averment of a colloquium about his office: and it was agreed that if the plaintiff had added an innuendo, that the deceit was in his office, it would not have availed: but ultimately they agreed that the words in themselves imported as much.

LORD ELLENBOROUGH, C. J. The only question is, whether this can be cured by verdict; for nothing can be more clear than the rule laid down in the books, and which has been constantly adopted in practice, not only where the words spoken do not in themselves naturally convey the meaning imputed by the innuendo, but also where they are ambiguous and equivocal, and require explanation by reference to some extrinsic matter to make them actionable; it must not only be predicated that such matter existed, but also that the words were spoken of and concerning that matter. As Lord C. J. *De Grey* says in the case of the *King v. Horne*, speaking of *Barham's* case, where the slander was, "he has burnt my barn;" the plaintiff cannot say, by way of innuendo, "my barn full of corn;" because that is not an explanation of the words, but an addition to them. But, he adds, if in the introduction it had been averred that the defendant had a barn full of corn, and that in a discourse about that barn, the defendant had spoken the words, an innuendo that he meant, by those words, the barn full of corn, would have been good. Lord C. J. *De Grey* does not say merely that the introductory averment, that the defendant had a barn full of corn, would have been sufficient to warrant the innuendo, but also that there was a discourse about that barn, in which the words were spoken. But if the first were sufficient, it was superfluous to mention the other. Now here one of the two ingredients necessary to found the innuendo is wanting. The prefatory allegation, that the defendant had put in his answer upon oath to a bill filed against him in the exchequer, is right: but whether the words were spoken with relation to that answer does not appear; unless, after verdict, it must be taken that they were so spoken. Upon this point we will look into the cases. But if a broad rule has been laid down as to the mode of declaring in this species of action, whether

properly laid down or not in the first instance, it is better to abide by it, than to attempt making nice distinctions. The only peculiarity in this case, which is relied on as distinguishing it from the current of authorities, is the preliminary matter averred respecting the fact of the plaintiff having before put in his answer to the bill filed in the Exchequer; and the question is, whether the innuendo alone will refer the words spoken to such introductory matter, so as to make it necessary for the plaintiff to prove every thing that would have been necessary to prove, if a colloquium had been laid. The case of *Savage v. Robery* seems to shew that it will not.

The case stood over till this term, when his lordship shortly adverted to the form of the declaration, as not containing any colloquium respecting the answer averred to have been put in on oath by the plaintiff to a bill filed against him in the Exchequer, in which he was charged to be forsworn: nor any colloquium respecting the plaintiff's trade, &c.: but only an *innuendo* that the plaintiff had perjured himself in what he had sworn in *his aforesaid answer* to the bill so filed against him: which innuendo, it was contended, enlarged the sense of the words by reference to the fact of such an answer averred to have been put in; and might be considered as supplying the want of a colloquium, averring that the words were spoken with reference to that answer. But upon looking into the case of the *King v. Horne*, the Court, he said, were of opinion that this innuendo could not supply the want of such a colloquium. (1)(2)

Judgment arrested.

Shakespeare v. Phillips.

8 East, 433. May 11, 1807.

Where the defendant in the action gave a cognovit for the debt and costs, payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed; at which day three only of the instalments were payable: and afterwards the principal was discharged under the act when only two more of the instalments had become payable: yet held that the bail were liable for the whole condemnation money; the entire debt, *qua* debt, being due *instantly*, with a stay of execution only for certain portions at certain times.

ON the 7th of *May* 1805, the defendant in the action gave a cognovit for 70*l.* 7*s.* 6*d.* the amount of the debt and costs, payable by instalments of 10*l.* every three months, the first of which was to be paid on the 6th of *July* 1805. On the 16th of *June* 1806, the judgment was perfected, and the bail became fixed. On the 21st of *July* following, the last insolvent debtors' act passed for liberating prisoners in custody for debts before the 1st of *February* 1806; at which time (the defendant being then in custody at the suit of another creditor,) three instalments were due; and in the *October* following, the principal was discharged under that act, when five instalments had become due. On the 6th of *January* 1807, all the instalments were due. Proceedings were had against the bail; whereupon a rule was obtained calling on the plaintiff to shew cause why an exoneretur should not be entered on the bail piece; the

(1) Vide *Roberts v. Camden*, 9 East 95, where the doctrine is admitted. *Stafford v. Green*, 1 Johns. 505. *Van Vetchen v. Hopkins*, 5 Johns. 211, 220, 1, 8. *M. Claghry v. Wetmore*, 6 Johns. 82. *Thomas v. Croswell*, 7 Johns. 271, 2. *Lindsey v. Smith*, 7 Johns. 359. In *Van Vetchen v. Hopkins*, the meaning and office of an *averment*, a *colloquium*, and an *innuendo*, in actions of slander, are explained by *Van Ness, J.* with great precision and clearness. The *English* cases are collected in *Selw. Dig.* 1164, 5. (1*st* Edit.)

(2) [See further upon this point, 9 A. & E. 286, *Wheeler v. Haynes*. 7 Price, 544. *Gainsford v. Blachford*. *Day v. Robinson*, 4 N. & M. 884. *Thompson v. Lusk*, 2 W. 17. *McKennon v. Greer*, do. 353. In these two last cases, C. J. Gibson has pointed out a nice distinction in the efficacy of an innuendo.—W.]

defendant having been discharged under the last insolvent debtors' act : and the bail having tendered the instalments on the cognovit which were due at the time they became fixed : and why the *capias ad satisfaciendum* issued against the bail of the defendant should be set aside, and the plaintiff pay the costs ; and 70*l.* paid into the sheriff's hands be returned to the bail.

Jervis and *Comyn* shewed cause against the rule, and stated the question to be whether the bail were liable to the debt sworn to and the taxed costs, or only to 30*l.* the amount of the three instalments which became due before the 1st of *February* 1806, the period of discharge to which the insolvent debtors' act referred : or to 50*l.* the amount of the five instalments due at the time when the principal was actually discharged out of custody. They likened this to the case of the principal, become bankrupt, (a) obtaining his certificate after the time when the bail are fixed ; where the latter remain absolutely liable to the sum sworn to ; though the principal be discharged. In like manner as a bankrupt's sureties are not discharged by his certificate, *Ex parte Williamson*, 1 Atk. 84 ; but have their remedy over against him for the amount of the debt paid by them after the bankruptcy : though the penalty of the bond were forfeited before, *Taylor v. Mills*, Cowp. 525. The bail engaged either to render the principal, or to pay the condemnation money ; which in this case is the whole debt, though time was given for payment ; and not having done the one, they are necessarily answerable for the other ; and the giving day of payment is in their favour. At any rate however, the bail, if not liable for the whole, are liable for the five instalments which became due before the act passed ; till when the plaintiff was entitled to have taken out his execution against the principal.

Marryat, contra, contended that the cognovit only authorized execution to be taken out against the principal for the instalments due from time to time ; and that as the act of parliament had discharged him from all debts prior to the 1st of *February*, the bail were only fixed for 30*l.* the amount of the three instalments then due : for the principal himself was not liable for more, and the bail are only to pay in default of the principal.

LORD ELLENBOROUGH, C. J. The debt, *qua* debt, was instantly due, both as against the principal and bail, but only with a stay of execution, according to the terms of the cognovit, for certain proportions till certain times. Then the undertaking of the bail is either to render the principal or pay the condemnation money ; which as against them, when they became fixed, was the one entire sum of 70*l.*, only with the same *dies dati* given as in the case of the principal.

LAWRENCE, J. It is not attempted to be argued that it was necessary to issue a new writ of *capias ad satisfaciendum* against the principal upon each instalment as it became due, in order to charge the bail.

Per Curiam,

Rule discharged.

(a) *Woolley v. Cobbe and Another*, 1 Burr. 244. And *Cockerill v. Orston*, ib. 436.

CASES

IN

TRINITY TERM,

IN THE FORTY-SEVENTH YEAR OF THE REIGN OF GEORGE III.

Smith v. Wilson.

8 East, 437. May 30, 1807.

By a charter-party of affreightment, the owner of the ship covenanted to take on board at London the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo, and (wind and weather permitting) proceed therewith to his port of discharge in *G. B.*, and there deliver the same to the freighter, and end the said voyage. In consideration whereof, the freighter covenanted to pay 670*l.* per month for freight, during the said intended voyage to *M. V.* and back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when she should have finally discharged the whole; and also to pay two-thirds of all pilotage and port-charges during the said voyage; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *G. B.*

In covenant by the owner for an alleged breach in non-payment of freight, pilotage, and port-charges, it is not enough to shew that the ship, after having taken in a cargo in *G. B.* and proceeded part way on the voyage, but before her arrival at *M. V.*, was without the default of the owner or crew, wrongfully seized and brought back to London, and there detained for some time till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch; and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose, and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c.; but that the freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (qua freight,) pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in *G. B.*; and therefore such arrival and discharge, (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage; and the performance of the condition which was to entitle the owner to freight, &c. would still have been contingent although such his offers had been accepted by the freighter. Therefore, this is not like the case where a party tendering to do that which he has undertaken, and which he has the immediate power of doing at the time, in order to entitle himself to a correspondent duty from another, is, by a refusal of that other to accept such tender, dispensed with averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty.

THIS case came on upon demurrers to the 4th, 5th, and 6th pleas to an

action of covenant upon a charter-party of affreightment; and was argued in *Easter Term* last by *Richardson* in support of the demurrers, and by *Marryat* for the defendant. It was admitted, that the 4th and 5th pleas were only intended to raise the question as to the validity of the declaration; and that if that were good, the pleas were necessarily bad. But supposing the declaration to be sufficient in itself, it was contended that the matter disclosed by the 6th plea was an answer to it; setting out, as it did, certain proceedings in the Court of Admiralty, where the ship and cargo were libelled, which the defendant relied on, as furnishing a legal excuse to him for not re-shipping his cargo, which had been unshipped by the orders of that Court, so as to enable the plaintiff's ship to proceed with the cargo on the destined voyage: but which plea the plaintiff contended to be merely argumentative and no answer to the breach assigned. It is unnecessary however to state the particulars of that plea, as the Court waived giving any opinion upon it, and decided the case wholly on the insufficiency of the declaration. The case stood over for consideration till this term, when

Lord ELLENBOROUGH, C. J. delivered the judgment of the Court. This was an action of covenant upon a charter-party of affreightment, made between the plaintiff, as agent of one *James Clarke* of *Baltimore*, owner of the ship *Portsmouth*, of the one part, and the defendant, the freighter, of the other part. The covenants on the part of the plaintiff were, that the ship, being properly fitted, &c., should receive and take on board at *London* or *Portsmouth*, at the option of the freighter, such goods as he might think proper to ship, and should sail and proceed therewith to *Monte Video*; and being arrived there, should give due notice thereof to the agents of the freighter, and make a right and true delivery to them of all such goods, &c. as might be shipped as aforesaid; and, after such delivery, should receive and take on board from the freighter, his agents, &c., a full and complete cargo of lawful goods, &c.; and having received the same, and being dispatched, should and would (wind and weather permitting) immediately set sail from thence, and proceed to some one port of discharge in *Great Britain*, agreeable to the directions the commander might receive from the said freighter, his executors, &c.; and the said ship being arrived at her destined port, the commander should and would make a right and true delivery of the said cargo unto the freighter, his executors, &c. agreeably to the bills of lading that might be signed for the same, and there end his said intended voyage; (the act of God, the king's enemies, and all and every the dangers and accidents of the sea, &c. excepted.) The owner further covenanted that the ship should, if required, touch at the coast of *Africa*, on this side of the *Cape of Good Hope*, on her outward voyage to *Monte Video*, and take in passengers for that place, for whom water and provisions were to be provided and paid for by the freighter. In consideration whereof, the defendant covenanted, that he, his executors, &c., would well and truly pay to the plaintiff 670*l.* sterling per month, for every calendar month the ship should be employed by him the freighter during her said intended voyage to *Monte Video*, and back to her port of discharge; and so in proportion for any less time; in full for the freight or hire of the said ship during her said intended service; such freight to commence from the day the ship should be ready to receive goods on board at *Portsmouth*, and end when she should have finally discharged the whole of her said cargo; and also should pay two-thirds of all pilotage and port-charges during the whole of the said voyage; and also two-thirds of all expences of stowing the said ship's cargo at *Monte Video*; such freight, pilotage, and port-charges, to be paid on the arrival and discharge of the said ship at her destined port in *Great Britain*. The declaration proceeds to state that the ship afterwards took on board at *Portsmouth* from the defendant, the freighter, such cargo as he thought fit to ship; and, being dispatched, proceeded on her outward voyage; and being required, touched at the coast of *Africa*, for the purposes in the charter-party mention-

ed: and that whilst she was afterwards prosecuting her outward voyage, and before her arrival at *Monte Video*, the ship, without the default of the plaintiff, the owner, commander or crew, was against their will, by force, wrongfully seized, taken, and detained on the coast of *Africa*, by persons unknown, and by them sent and conducted to *London* and was by those persons forcibly kept and detained for a long time afterwards, until she was liberated and restored to the plaintiff. That in consequence of the seizure, detention, and other circumstances stated, the ship, upon her liberation and restoration, required certain necessary repairing and refitting, to enable her to prosecute and complete the voyage: that the plaintiff caused such refitting and repairing to be done with all necessary dispatch: and that the plaintiff always, *from the time of the liberation, restoration, and refitting of the ship, was ready and willing to cause the ship to prosecute and complete the said voyage, and gave notice thereof to the defendant, and tendered and offered the ship to him to prosecute and complete that voyage, and requested him to give the necessary directions and instructions in that behalf, and to permit the said ship to prosecute and complete such voyage, and offered to observe such directions and instructions; and would have caused the ship to prosecute and complete that voyage: and avers that the ship was properly fitted, victualled, and manned for the purpose; and that the defendant had notice of it.* The declaration further states, *that the defendant did not, nor would give any directions or instructions respecting the ship, or the prosecution of that voyage; nor did, nor would permit the ship to prosecute or complete the same; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the defendant from further prosecuting or completing that voyage, and dispensed therewith.* The plaintiff then proceeds to state, that the ship was employed during the voyage in the charter-party mentioned for 12 months, and that *the freight thereof, according to the rate of the charter-party, amounted to 8040*l.*; and that the same ship would have been employed by the defendant, if he would have permitted her so to be during the further prosecution and completion of the voyage for other 12 calendar months; and that the freight thereof, at the same rate, would have amounted to other 8040*l.*; and that two-third parts of the pilotage and port-charges of the ship, paid for and incurred by the plaintiff during the voyage, amounted to a further sum of 50*l.*: and then assigns a breach in the non-payment upon request of the freight, pilotage, and port-charges, so claimed. To this declaration there were seven pleas pleaded on the part of the defendant: upon the three first of which issues were taken: to the 4th, 5th, and 6th, of which there were demurrers and joinders in demurrer: and to the 7th there was a special replication upon which issue was taken by the rejoinder.*

The question in this case arises upon the demurrers and joinders in demurrer to the 4th, 5th, and 6th pleas; the substance of which pleas it is unnecessary to state, because assuming them to be bad in law, the defendant is nevertheless entitled to judgment, if the declaration be bad in substance, as it appears to us to be. The breach assigned is in the non-payment of what is claimed by the plaintiff, *eo nomine*, as *freight*; viz. 8040*l.* at the charter-party rate of 670*l.* per month, for 12 months that the ship *was employed* during the voyage; and the like amount of the like rate for *freight* for other 12 months that the ship *would have been employed* by the defendant, (as alleged,) in the further prosecution of the voyage, if the defendant would have permitted her so to be. But, by the terms of the charter-party, *the freight, pilotage, and port-charges*, thereby covenanted to be paid, on the part of the defendant, are all of them expressly covenanted to be paid, "*on the arrival and discharge of the ship at her destined port in Great Britain;*" and of course are made to depend on the event of such arrival and discharge at her destined port in *Great Britain*, as a condition precedent to the plaintiff's right to demand the same. But it is argued, on the authority of *Jones v. Barklay*, (Doug. 685,

last edit.,) and *Hotham v. The East India Company*, 1 Term Rep. 638, that the plaintiff, having done all in his power towards earning the freight, pilotage, and port-charges in question, by the tender and offer of his ship to complete the voyage, by his request of necessary directions and instructions, and his offer to obey them, &c.; and the defendant having, as alleged in the declaration, refused to give any directions or instructions for the ship, or the prosecution of the voyage, and having wholly renounced the charter-party, and the further prosecution of the voyage, and having discharged the defendant from further prosecuting or completing the voyage, and dispensed therewith; that the plaintiff had acquired the right to the sums demanded *as freight, &c.*, as completely as if the voyage had been performed, and the ship had arrived and been discharged at her destined port. But the decision of the Court in neither of the cases cited sustains the argument urged on behalf of the plaintiff in this extent. The most that can be understood to have been there decided is, (what was contended for by the plaintiff's counsel in the case of *Jones v. Barklay*,) that where a man "by doing a previous act would acquire a right to a debt or duty; by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." But the question still occurs whether, by actually doing the previous act tendered to be done in this case, the plaintiff would have acquired a right to the freight, and other payments demanded? Here, if he had done all that he offered to do, and which the defendant discharged him from performing, still it would have amounted at most only to an *endeavour* on his part to prosecute and complete the voyage, and to procure, as far as in him lay, the arrival and discharge of her at her destined port: but the actual event of such an arrival and discharge it did not depend upon him, nor was it within the reach of any efforts on his part, to insure and to accomplish; but it was liable to be disappointed by the act of God, and all the various other accidents to which marine adventures are subject. But in the case put, (i. e. of *Jones v. Barklay*,) no contingency but the immediate death of the party tendering the act could have disappointed its performance; and, being done, the party doing it would have instantly acquired, without any further act, either on his own part, or on that of any one else, a full right by the terms of his contract to the duty demanded; which in that case was the payment, at a given time, of a sum of money stipulated to be paid him. So that the difference between the two cases is this; in the one, by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded: in the other, by doing the act tendered to the full extent to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect *towards the attainment of the object and completion of the event necessary to be attained and completed* in order to vest a right to the duty demanded in the party demanding it. The same in effect may be said of the case of *Hotham v. East India Company*, 1 Term Rep. 638, where the *only thing* which stood in the way of the plaintiff's recovering the allowance claimed for short tonnage, according to the terms of his charter-party, (after having taken *all* proper steps on his part to obtain the necessary certificate to entitle him thereto,) was the neglect and default of the Company's own agents in refusing to afford him such certificate. Covenants of this kind have always received a strict construction. In *Bright v. Cooper*, 1 Brownl. 21, the covenant made by the merchant with the master of a ship, being to pay such a sum if he would bring his freight to such a port; and part of the goods being taken by pirates, and the residue brought to the place appointed and there unladed; the Court held that the merchant was not bound to pay the money to the master, because the agreement was not performed by him. And the late case of *Cook v. Jennings* in this Court (7 Term Rep. 381,) proceeded upon the same principle. Adverting therefore to the declaration only, and the breach therein assigned, we are of opin-

ion, that as the ship never arrived at her destined port, within the terms of the charter-party, the freight claimed in the declaration never became demandable by law; and of course that the plaintiff cannot recover thereupon; which renders it unnecessary to consider the sufficiency of the several pleas demurred to, and the questions which might otherwise have arisen upon them.(1)(2)

Judgment for the Defendant.

Ingram and Others v. Milnes.

8 East, 445. May 30, 1807.

The submission being of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their *banking account*, and for which sum the plaintiffs were to give the defendant a release, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn: and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund in which others than the defendant were interested who were no parties to the submission.

IN debt the plaintiffs declared, 1st, upon a bond in the penal sum of 2000*l.* conditioned for the performance of an award to be made within a given time by certain arbitrators, to whom it was referred to arbitrate and determine "of and concerning all and all manner of actions, suits, controversies, &c. and demands whatsoever, at any time depending, &c. by or between these parties, and the costs and charges of any action, &c. then depending between them: and then the plaintiffs alleged an award made by the arbitrators within the time, by which (*inter alia*) they awarded that the defendant should at a certain day and place pay to the plaintiffs 472*l.* 4*s.* 2*d.*, being the balance due on the banking account of the defendant with the plaintiffs; of which the defendant had notice: and then alleged a breach by non-payment of the money. There was another special count on the bond alone; and also general counts for money paid, money lent and advanced, money had and received, &c., and upon an account stated. To the 1st count there was a plea of no award, and to the others nil debet and a set-off were pleaded. At the trial before *Le Blanc*, J. at York, the plaintiffs abandoned the special count on the award, and resorted to their general counts; and proved money advanced by them as bankers by the defendant on his separate account to the amount of 800*l.* In answer to this the defendant was driven to prove the award, in order to limit the sum to be recovered: but the plaintiffs contended that the award was bad, and consequently not binding upon them. And the question at the trial turned on the validity of the award; which after stating the terms of the submission, as before mentioned, and that the arbitrators had examined and considered the allegations, witnesses, and evidence of all the said parties concerning the premises, proceeded to award that all actions and suits then depending between the parties should cease. That the defendant on the 1st of October 1805, should at the plaintiff's bank in Wakefield, pay to them 472*l.* 4*s.* 2*d.*, being the balance due on the banking account of the said John Milnes (the defendant) with the said plaintiffs. That the plaintiffs should pay unto the said John Milnes 116*l.* 2*s.* 8*d.* (the residue of a debt of 664*l.* 11*s.* 8*d.* due to him from Milnes, Lang, and Whitaker), (a) from and out of the first monies which should be received by them on account of, or belonging to the said Milnes, Lang, and Whitaker, together with interest, &c. That the plaintiffs should,

(1) Vide *Osgood v. Groning*, 2 Campb. 466.

(2) [See *Barker v. Cheviot*, 2 Johns. 352. *Scott v. Libby*, ib. 336.—W.]

(a) *Lang* and *Whitaker*, it appeared in the course of the cause, were partners with the defendant *Milnes*, and also had an account with the plaintiffs, bankers in *Wakefield*, on their partnership account.

on the said 1st of *October*, carry to the credit of *Milnes, Lang*, and *Whitaker's* account with them four several promissory notes for 1000*l.* each drawn by *Lang* and Company, payable to *Milnes, Lang*, and Co.; and which said notes were paid by *Milnes, Lang*, and *Whitaker* to the plaintiffs; and should also place to the credit of the account of *Milnes, Lang*, and *Whitaker* all such sums as had been or should be received on the said notes. Then after stating other irrelevant matter, the arbitrators further awarded, that upon payment of the said sum of 472*l.* 4*s.* 2*d.* as aforesaid, the plaintiffs should execute to the defendant a release in full of all claims and demands for or in respect of the several sums included in the account upon which the said balance of 472*l.* 4*s.* 2*d.* arose, &c. It was admitted, that the award was bad for so much as respected the payments to be made to the defendant by the plaintiffs out of the partnership funds of *Milnes, Lang*, and *Whitaker*, the two latter of whom were no parties to the award: and the learned Judge thinking that the sum awarded to be paid by the defendant to the plaintiffs might have been affected by the other accounts which the arbitrators had improperly taken into their consideration, rejected the evidence of the award as bad in toto, and the plaintiffs took a verdict for 800*l.* *Wood* therefore, in the last term, moved to have the verdict entered on the first or second count for 472*l.* 4*s.* 2*d.*, on the ground that the award was good for so much at least, though bad for the sums awarded to be paid by the plaintiffs to the defendant out of a fund belonging in part to other persons; and that the defendant might avail himself of that part of the award which fixed him with a certain debt to the plaintiffs on his own account, though he could not avail himself of that which was meant to be in his favour. A rule nisi was accordingly granted, against which

Topping and *Littledale* now shewed cause, and contended that the award was void in toto, inasmuch as it did not settle all matters in difference between the parties, which it was the object of the reference to accomplish. The arbitrators consider that something is due to the defendant from the plaintiffs upon the settlement of another account, but have awarded payment out of a fund over which they had no controul; and their award consequently leaves the plaintiffs liable to be sued on that account: though it assumes to settle the balance due to them from the defendant on his banking account: and the release is only directed to be given by the defendant on that account. It is not therefore a mere excess of authority in the arbitrators; but like *Randall v. Randall*, 7 East, 81, the award is bad, because they have not made a final end of the suits and controversies between the parties, in pursuance of their authority. In answer to a suggestion from the Bench, that it did not appear there was any other than the banking account between these parties: they answered, that the contrary was to be collected from the arbitrators having directed the plaintiffs to execute a partial and not a general release; and that it was incumbent on those who now insisted on the award to shew that in fact there was no other account submitted to the arbitrators, if the fact were so. And there was no award of any release from the defendant to the plaintiffs.

Park and *T. Harrison*, contra, said, that the directions of the award were consistent with the state of the case that there was no other than the banking account between these parties, though there were other partnership accounts in dispute between the plaintiffs and the defendant as one of the firm of *Milnes, Lang*, and *Whitaker*; the two latter of whom were no parties to the reference. The award therefore was final as between the present parties, and the release was properly ordered to be given in the form prescribed.

The Court said, that if it could be shewn that there was any other matter in difference between these parties than the banking account, the award could not be sustained in any respect; but they thought that it lay upon the party who impeached it to shew that there was some other matter in difference; and that otherwise they could not intend it, though the reference were of all matters in difference between the parties. If the award had been pleaded in

bar to an action brought by the plaintiffs to recover the balance on their banking account, the plaintiffs must have replied that there were other matters in difference within the terms of the reference, on which no award had been made, in order to avoid the award. And here the plaintiffs having abandoned the special counts at the trial, and gone upon the general account: and the defendant having set up the award in evidence under the general issue; it was competent to the plaintiffs by way of reply to that evidence to shew any matter which made the award void. And *Lawrence, J.* referred to 1 Com. Dig. tit. Arbitrament, E. 10, where it is said, that if an award recite that controversies were depending 29th of *January*, and it be made *de et super præmissis* of all matters till the 28th of *January*; it is good: for it shall not be intended, unless it be averred, that any matter was depending on the 29th of *January* which was not so on the 28th. And again; if there be a submission of all matters *ita quod fiat de præmissis*; an award *de præmissis* of a single matter is good: for others shall not be intended unless they be shewn. For which several authorities are cited. The Court therefore directed that the case should stand over for some days, in order to give the plaintiffs an opportunity of shewing that there were other matters in difference between these parties than the banking account, which were submitted to the arbitrators for their decision; without which they were of opinion that the award in question was good so far as respected the banking account, though void in respect of the sum awarded to be paid by the plaintiffs to the defendant out of the partnership fund of *Milnes, Lang, and Whitaker*, which was not submitted to the arbitrators by the terms of the reference. And no such affidavit having been produced, the rule was made absolute for reducing the sum for which the verdict was taken, pursuant to the award. (1)

The King v. Jones and Others.

8 East, 451. June 3, 1807.

The owners of the packet boats, employed under a personal contract with the post master in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable, in respect of the profits accruing to them from the carriage of passengers and luggage in such boats, to be rated for the same in the parish of *Holyhead*, where such owners reside, and from and to which the boats sail, where they are repaired, and where the passage money is in part receivable and is collected, though they are registered in another place.

THE defendants appealed to the Sessions against a rate made for the relief of the poor of the parish of *Holyhead* in the county of *Anglesey*: by which it appeared, that "*Captain Jones*" was rated "*for his packet*, at 250*l.*—6*s.* 5*s.*" and three other defendants, captains of packets, were respectively rated, each *for his packet*, in the same sum. It further appeared on the trial of the appeal, that the appellants have all their houses at *Holyhead*, where their families at present reside; in respect of which houses they have been and are assessed to the poor's rate; but that heretofore some of them have resided in *Dublin*; and that government do not fix their place of residence. *Holyhead* is a place of little or no trade, having only a few small shops, the owners of which are not assessed to the poor's rate. Each packet boat, including the furniture, costs between 2 and 3000*l.*, and is provided by and at the expence of the appellants respectively, who are commanders thereof, and are at liberty to dispose of the same, provided they find others in their stead, to be approved by government, and so that the carriage of the mails, &c. be not obstructed; and the commanders may hire vessels to be used as packet boats from any other port, provided they are approved of by government. The packet boats of the respective appellants are registered in the port of *Beaumaris*. [And the case

(1) Vide *Gaylord v. Gaylord*, 4 Day, 422.

set out a certificate of registry of one of the packets, by which it appeared that one of the appellants had made oath that he was the *sole owner*; describing himself as of *Holyhead*; and that the vessel was built there, and measured 104 tons and upwards, together with the usual description of her built, rigging, &c.] When hailed at sea, and asked where the packet boat belongs to, the answer is *Holyhead*; and the seamen navigating these boats reside at *Holyhead*. The appellants are respectively commissioned by his Majesty's Post-masters General, who, by an instrument under their hands, and the common seal of the General Post-office, appointed the appellants respectively to be commanders of their several packet boats; and the commissions run in these words, "W. Lord A. and C. S. &c. his Majesty's Post-master General, to Captain W. F., greeting: By virtue of the authority to us by the King in this behalf given, &c. we do hereby appoint you the said W. F. to be commander of the *Leftus* packet boat employed by this office in his Majesty's service to carry mails, &c. to and from *Holyhead* and *Dublin*. You are therefore to take the said packet boat into your care and charge, as commander thereof, and to keep as well the officers as the sailors belonging to the same in good order and discipline; and they are hereby required to obey you as their commander: and you are to observe and obey such orders and instructions as you shall from time to time receive from us or our agent for the time being. Given," &c. (a) The packet boats are employed in the service of government to carry the mails, &c. between *Holyhead* and *Dublin*, for which the commanders receive annual salaries. Each commander for better security is obliged to have his packet boat doubly rigged and doubly manned; and the annual expence attending the navigating, repairs, furniture, and other outgoings of the packet boats exceed the annual salary or allowance made by government for that purpose. But by permission of the Postmaster-General the appellants carry on board their packet boats passengers with their luggage, horses, and carriages, and thereby make annual profits, which are of a fluctuating nature, as they depend upon the numbers of passengers, horses, and carriages which pass and repass: but the average is not less than 250*l.*, the sum at which they are rated. The passage money is paid where the passengers are landed or leave the packet boat; and as much of the passage money is received in *Dublin* as at *Holyhead*. The commanders are not allowed to be absent from their respective packet boats without leave of the Postmaster-General or his agents; and though they have such leave, the commanders are, by a regulation of government, ordered to be mulcted 40*s.* for every time a packet boat sails without its commander on board; 20*s.* of which is applied towards a fund for the relief of the commanders' widows: 10*s.* towards a fund for the widows of the mates; and 10*s.* to the mate who sails with the charge of the packet boat for his extra responsibility. One packet boat sails every day of the week with the mail, &c. (except *Tuesday*) from *Holyhead*, on which day no *London* mail arrives there; and on every day of the week (except *Sundays*) from *Dublin*, on which day no mail leaves *Dublin*: but they frequently sail on *Tuesdays* from *Holyhead*, and on *Sundays* from *Dublin*, with expresses and under the orders of government, and likewise with the mails when they have been detained by storms the preceding day. The commanders are bound to put to sea with the mail or express, however bad the weather may be, and have often been obliged to return to port. They are furnished by government with arms and ammunition; and government also sends to each commander its private signals of war, who communicates them to his mate alone, under an injunction of secrecy. The crews are protected from being impressed by the Postmaster-General, under the direction of government, except in case of misconduct reported to government. According to the regulations of government the commanders are prevented from hav-

(a) In answer to an inquiry made by the court, it did not appear that the boats were engaged under any other written contract than what appeared in the case.

ing any apprentice, and are obliged to have at all times at least ten other able seamen on board. The commander has the whole charge of the repairs of the packet boat, without any allowance from government. They frequently sail without a passenger on board; and are prohibited from carrying on any trade in the packet boats, as well by orders of government, as by the restriction of the act 13 & 14 Car. 2. c. 11. s. 22. But they make no custom-house entries, pay no custom-house fees, harbour dues, port-charges, or for lights, as trading vessels do; but 50*l.* a year is paid to the owner of the *Skurry* lights by the Postmaster-General, by virtue of the stat. 3 Geo. 3. c. 36. The appellants are responsible for their conduct as commanders of their packet boats to the Postmasters-General, who have a power of suspending them if their conduct be disapproved of; which power has been exercised. The packet boats had formerly painted on their sterns the words *his Majesty's packet*, adding the name of it; but the present boats have no such words. Before a new packet boat is laid down a plan must be sent up to government, to be laid before an inspector; upon whose report it is built; and while building he examines it, and afterwards certifies that it is fit for his Majesty's service. The case also stated one or two particular instances of a packet boat having been ordered off its station to another port for a special purpose. When there is an order from government to carry over any particular person, the agent to the postmaster, under such order, prevents any other person from sailing in the packet boat, without the consent of the person for whose use it is so employed. Even in those cases, however, a preference is given to the mail, should such engaged packet boat be the only one in port. (a) The sessions on hearing the appeals confirmed the rate; subject to the opinion of this Court, whether the appellants ought to be assessed. If it were considered that they ought not; then the rate was ordered to be amended by striking out their names.

Holroyd was to have argued in support of the rate; but after referring to the *King v. White*, 4 Term Rep. 771, where it was decided that ships were rateable in the port to which they belonged; the Court, considering that case as concluding the question, called on the other side to controvert its authority, or to distinguish the present case from it.

Park and *Abbott*, contra, first said that the case of the *King v. White*, so far as respected the general question of the rateability of shipping, had been shaken in *Rex v. Liverpool*, (b) and *Rex v. Collison*; (c) though the point

(a) There was much irrelevant matter stated in the case, which has been omitted.

(b) Hil. 38 Geo. 3. B. R. vid. next note.

(c) E. 43 G. 3. B. R. A note of this case was referred to in the last edition of Burn's Justice, tit. Poor Rate.

Rex v. The Inhabitants of the Parish of Liverpool. Hil. 38 Geo. 3. B. R. MS.—*Wm. Harper* appealed to the sessions against a rate wherein certain ships of his were rated. It was admitted by both parties, upon the hearing of the appeal, that the appellant *dwells* at *Everton*, a township adjoining the parish of *Liverpool*, and situated in the parish of *Walton upon the Hill*, in the county of *Lancaster*. That he holds now, and when rated held, a warehouse and counting-house in the town and parish of *Liverpool*, for both of which he is assessed by the rate, and has paid for the same: but that there is not any bed either in the warehouse or counting house; nor does, nor at the time of rating did, any person sleep in either of them. That the ships for which the appellant is rated are registered at the port of *Liverpool*, and are in the same register mentioned to belong to that port, and to be property of *Wm. Harper of Everton, &c.* That the said township of *Everton* is an inland township, not accessible to ships. On hearing the appeal, it was contended by the appellant's counsel, that he was not at the time of making the rate an inhabitant of the parish of *Liverpool*, and therefore that the rate ought to be quashed as to the ships. And it was contended by the respondents that the appellant was, under the circumstances, an inhabitant of the parish at the time. The sessions thereupon quashed the rate as to the ships, subject to the opinion of B. R., whether the appellant under the circumstances above stated, were liable to be rated for the ships.

When this case was called on for argument, the Court said that the question intended to be raised did not arise upon the statement of the facts; because the sessions had found that the appellant was no inhabitant within the parish of *Liverpool*, but resided in a neighbouring parish: and they had not found that the ships rated were locally within the

was not expressly decided, [*Lawrence*, J. observed, that both those cases were defectively stated, and did not raise the general question. The statute 43 Eliz. c. 2, imposes the rate upon *inhabitants* and *occupiers*; and the Court only decided there, that a person not *inhabiting* within a parish was not rateable there, merely because he had a ship registered at the port and lying there at the time.] In *Rez v. Collison, Le Blanc*, J. considered that the proprietors of a mail coach could not be rated in any parish where it happened to put up in the course of the journey. [*Lawrence*, J. That was still said with reference to the question of inhabitancy.] They then argued generally, that this species of property was not rateable. Personal property is only rateable when permanently local and visible, and producing profit, within the parish where

parish, but only within the *port of Liverpool*, which might not be, and indeed they understood was not, co-extensive with the parish: and it was only on one or the other of those grounds that the rate could be supported. The counsel said that the sessions did not mean to find that the appellant was not an *inhabitant*, in a legal sense, of the parish of *Liverpool*, but to submit that question to the Court, under the circumstances. And as to the ships having been within the limits of the parish, there was no doubt of the fact. And therefore they desired that the case might either be amended by consent in that respect, or sent back to the sessions to be restated more accurately. But the Court said, that they should dispose at once of this case, by directing the rate to be quashed, as to the ships; and the parties might bring on the question again upon a new rate if they thought proper. Lord *Kenyon*, C. J. however, threw out an opinion inclining against the rateability under these circumstances. He said that a person might be deemed an *inhabitant* for some purposes and up to a certain extent, and yet not for all purposes; as in the case of repairing bridges, where according to Lord *Coke*, occupancy was *inhabitantcy*. But he saw no reason, if this party were rateable in respect of his *inhabitantcy*, why a *Dane* who came with his ship into the port and parish should not also be rateable; or why this same property should not be rated at every place on the coast whereat the vessel touched in her voyage. He observed that the stat. 43 Eliz. did not direct personal property to be rated *eo nomine*, but the persons themselves, *inhabitants*, according to their ability; which can only be known, in respect of personal property, which is of a fluctuating nature, by stating the account of debtor and creditor, and taking the surplus only as the criterion of that ability.

Rez v. Collinson and Taylor, E. 43 Geo. 3. B. R. M8. Upon a case reserved at the sessions, as to the rateability of the defendants for their ships at *Hull*, it appeared they did not reside at *Hull*, though *Collinson* had a counting-house there. But the defendants were stated to be the owners of the ships, and that the ships were locally within the parish at the time of the rate, and were registered at the custom-house there. On which it was contended that the parish of *Hull* was their *home*, and that it must be so considered for the purpose of the register acts. That if this species of property were rateable, as it was determined to be in the case of the *King v. White*, it mattered not whether the owners were or were not personally resident in the parish: for there must be persons on board the ships to take care of them; and the possession of beneficial property in a parish by means of a servant or agent was the same as a possession by the owner himself. And no inconvenience, it was observed, could ensue from his absence, because the parish had a remedy for the amount of the rate by means of a distress on the property itself. The Court, however, had great doubts upon the statement of the case, as well on the question of inhabitancy, which they seemed to consider as negated by the statement; as also upon the defect of the case in shewing that the owners derived any benefit from the ships within the parish of *Hull*. They seemed to be clearly of opinion that the mere fact of the ships being registered at *Hull* could not make them rateable there; vessels were sometimes rated in places not their proper home. The registry was merely for the purpose of recording the transfer of property: and it was not considered of any weight in the case of the *King v. Liverpool*: and there too the party rated had a counting-house in the place. They observed also that the case did not state that the ships in question terminated their voyage at *Hull*, or that the owners received any profit there; without shewing which, they might on the same ground be rated at every place where they touched in the course of their voyage. And *Le Blanc*, J. asked, whether the proprietors of stage coaches were liable to be rated in every parish where they stopped and changed horses in the course of their journey. The case was finally remitted to the sessions to be restated.

The same question came on again before the Court in another case from *Hull*, of the *King v. Howard*, M. 44 Geo. 3. B. R. But on its being called on for argument, Lord *Ellenborough*, C. J. said, that it was not stated that the ship was locally within the parish at the time of the rate, or that it produced any profit. That a ship might have met with losses at sea to a greater amount than her value; and was she nevertheless to be rated as soon as she came into port? The rate was thereupon quashed.

the owner resides. If it have no proper locality, but is continually shifting from one place to another; if it be fluctuating and uncertain in its produce, like cases of casual adventure; still more if, while situated within the parish, it is wholly unproductive, and whatever profit may be made of it is earned elsewhere; it does not come within any of the principles on which property has been held to be rateable within a parish. Now here so long as the packets are stationary within the parish of *Holyhead*, nothing is earned to the appellants; the passage money, though paid at one or other of the two ports, is earned between the limits and out of the parish, and depends, besides, upon various contingencies. They then argued that the appellants acted under the command, and as the immediate agents of the king, in whose employ the packets must be taken to be; and that the permission to receive passage money was merely a mode of enhancing their salaries, which, without it, would not remunerate their labour, nor be adequate to the expences incident to their situation, and the providing and repairing the vessels: and that salaries,^(a) and personal labour^(b) had been holden not to be rateable. That if the appellants received so much less, in consequence of being rated, than what was deemed a fair compensation to them, including the perquisite of passage money, their salaries must be increased, and the crown ultimately bear the burthen; though it is clear, that property in the hands of the crown, or held for its benefit, cannot be rated.^(c)

Upon this part of the case, however, *the Court* very early in the argument expressed a clear opinion that, as the case was stated, they could not take these packets to be the property *pro tempore* of the crown. They were provided and kept in repair by the appellants, who must be taken to be the owners, and who engaged them in the service of the post office upon certain terms. In like manner as transports are contracted for by the navy board on freight to carry troops, or for other purposes; but it never was considered that the property in them was transferred to the crown, though the masters were subjected to a certain degree of discipline and controul while engaged in the service. And some of the judges even intimated a doubt whether the *salary* of the commanders, as it was called in the case, were any other than part of the hire and earning of the packet boats: but there was no decision on this part of the case. And

Holroyd observed, that not long since one of the *Harwich* packets, which are employed in the same manner as these, was taken in execution for the debt of the owner: and though the question was under consideration, no doubt was entertained but that the vessel was properly seized by the sheriff.

LORD ELLENBOROUGH, C. J. I cannot distinguish this from the case of the *King v. White*; and unless the Court felt themselves pressed to surrender the authority of that case, these packet boats must be rateable. It is objected that they are not permanently local property in the parish of *Holyhead*, and that no profit is made of them there. But the inchoate act which is to earn the profit begins there; and therefore there is a part-performance within the parish of that which is to make the profit by the use of the property in question. The boats are laid up there; they are repaired there; the owner dwells there; they yield profit there; for the passage money of the voyage from *Dublin* is actually earned there; and that of the voyage from *Holyhead* to *Dublin* is at least begun to be earned in the parish of *Holyhead*. But whatever the question might be as between *Dublin* and *Holyhead*, in this respect, it could only go to the quantum, with which we have no concern in this case: it is enough that this is, what it is contended it ought to be, local visible property in the parish; that it yields some profit there cannot be doubted; and

(a) *John Lander's case* in *Rez v. White*, and *Others*, 4 Term Rep. 774, and *Captain Langhorne's case*, *ibid.* &c.

(b) *Rez v. Hogg*, 1 Term Rep. 731, and *Rez v. Startifant*, 7 Term Rep. 60.

(c) *Lord Amherst v. Lord Somers*, 2 Term Rep. 372.

the owner resides in the same parish. This brings it completely within the *Poole* case: and if the extent of the voyage, and the length of time during which the vessel is absent from its own port could at all vary the consideration, these circumstances are more in favour of the rate in the present case. But independently of the authority of that decision, I think it rests upon sound reason: for the possession of such a vessel within the parish by an *inhabitant* actually residing there, and making profit of it, constituted so much of his *local ability* to contribute to the maintenance of the poor of the parish under the description in the statute of Elizabeth.

GROSE, J. The question is whether these appellants, who are inhabitants at *Holyhead*, are rateable on account of property in that parish. First, it is said, that the packet boats, in respect of which they are rated, are not property within that parish: but the facts of the case are an answer to that objection. *Holyhead* is the home of the packets: from thence they take their departure, and thither they return; there they are repaired; and there their owners reside; and the property so circumstanced is stated to produce great profit to the owners. They are therefore liable as inhabitants within the parish to be rated for it, within the fair meaning of the statute of Elizabeth: and the case of the *King v. White* is directly in point as to the rateability of inhabitants for this species of property. But then it is said, that this is the property of the king, and therefore not rateable; and that the perquisite of passage money is in lieu of an additional salary. But there is no pretence for saying that these packets are the property of the crown; the owners make a personal contract with the post office, on certain terms, to carry the mails, &c. and in consequence of the regulations under which they oblige themselves to navigate their vessels, it is notorious in every port where they are established, that they have much greater custom in carrying passengers, &c. than any other vessels: and here the advantage is stated to be 250*l.* a year; much above what they receive directly from government, under the name of salary. There is therefore no reason why the owners, who reside in the parish, should not be rated for this species of property within the parish, from which they derive so much profit.

LAWRENCE, J. The case of the *King v. White* rules the present case; and unless we are prepared to overturn that, we cannot do otherwise than confirm the rate before us. The cases, which have been mentioned, of the *King v. Liverpool*, and the *King v. Collison* were not intended to shake that of the *King v. White*; for in the two former the attempt made was, not to rate ships being in the parish where the owners resided, but in a different parish, merely because the ships were registered there. And all that the Court there meant to say was, that a ship being registered in a parish did not make the owner an inhabitant of that parish, within the meaning of the statute of Elizabeth. But it is insisted that the packet boats belong to Government, and not to the appellants who have been rated for them: the true nature of the contract, however, as it appears, is, that the Post-masters contract with these persons for the hire of their vessels to carry over the mails to *Dublin*; but that does not make them cease to be their property; and they continue to make all the advantage of it for their own benefit which the nature of their employment admits of. And though the government may exercise authority over them in certain particulars, yet that is no longer, nor otherwise, than as the owners choose to retain their employment. They are paid in the double character of owners and masters. And they are subjected to the controul of the post office for the exigency of the service, in like manner as are the masters of transports, which are always subject to the controul of the transport board: but that was never conceived to divest the property of the owners in those vessels and transfer it to the crown. The bye-boats between *Calais* and *Dover* are engaged in the same manner. If the master of a ship, not under charter-party, engage to

carry out troops for government to the *West Indies*, the property still continues in the owners: and it cannot make any difference whether a vessel be hired to carry out passengers, or goods; or whether the service be performed under a hiring by the crown, or by a private individual: the property still remains in the owners; the seamen and others employed on board are their seamen and servants, and not the seamen or servants of the crown. In respect to these packets, if certain things which the owners engage for be not done, government may cease to employ them any longer; but they cannot divest them of their controul over the vessels and appoint others to command them. Then it is argued, that this is not local visible property, producing profit, within the parish: the case however states that the boats are built and repaired at *Holyhead*; that the masters live there, and there hire the crew. There is no other place besides *Holyhead* and *Dublin*, to which it can be pretended that these boats belong: but though there were the same poor laws in *Dublin* as here, I do not see how the boats, under these circumstances, could be rated there: though even that would not affect the quantum of the rate. It is said, however, that to make property rateable in any parish, it must be *permanent* in that parish, and produce profit there; and that this property is only made productive by going out of the parish. The same argument, however, applied with equal force in the case of *The King v. White*, where it was over-ruled. But why may not this property be said to be productive in the parish? The contract for the passage money from *Holyhead* to *Dublin* is made at *Holyhead*; and there is an inchoate inception of the voyage there: and that from *Dublin* is actually paid at *Holyhead*, where the contract is completed. At any rate, however, this objection, if it could have place at all under these circumstances, would only go to the quantum; though at present I think the boats would not be rateable at all in *Dublin*.

LE BLANC, J. I am of opinion that these boats are local visible property in the parish where they are rated. The rate is made on the persons inhabiting within the parish in respect of the packet boats there belonging to them: and the only question is, whether this be that sort of property for which the parties are liable to be rated? The case of *The King v. White* determined that the owner was liable to be rated for a ship in the parish to which it belonged, and where he himself lived. In this case I must consider that the packet boats are the property of the appellants, because they build and repair them: it is part of their respective capitals invested in shipping. The registry acts have no bearing upon this case. The only argument which has ever been drawn from them is, that they require that a ship should be registered at the port at or near which the owner lives: (a) and therefore that the registry in any port was to be taken as an indication of the owner's residence there. But here it expressly appears that these boats are the property of the appellants, who reside in the same parish from whence the boats sail and to which they return. The contract which the appellants have entered into with government for carrying the mail cannot differ this from the case of any ordinary contract for the carriage of the goods or persons of any individuals. Government indeed may deem it proper to stipulate for a certain number of seamen, &c. for securing a safe and convenient navigation of the boats; and the burthen of providing this superior accommodation may make the property less productive than a smaller establishment would do: but that does not vary the question of ownership; it only goes to the quantum of profit, with which we have no concern. This cannot therefore be considered as a rate on government, but upon the

(a) The provision of the 5th sect. of the stat. 26 Geo. 3. c. 60, is, that the port to which a ship shall be deemed to belong (and where by sect. 4, she is to be registered) *within the intent and meaning of that act*, shall be the port from and to which such ship shall usually trade, &c., and at or near which the husband, or acting and managing owner or owners, usually reside.

capital of these appellants, employed in this manner in the parish, and yielding them profit.(1) Rate confirmed.(a)

Synge, Executor, &c. v. Jervoise.

8 East, 466. June 23, 1807.

The time limited by the statute 9 & 10 W. 3. c. 15. s. 2, for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of *nisi prius*.

AT the trial of this cause, a juror was withdrawn, and it was agreed to be referred under an order of *nisi prius*, which was afterwards made a rule of Court; and an award was afterwards made on the 27th of *March* last. And now *Wigley* moved to set aside the award upon the ground of misconduct in the arbitrator. But an objection was started *in limine* by the Court to their entertaining the motion, on account of its being out of time: one whole term having elapsed since the award made. And though it was observed, that this was not a reference under a rule of court by virtue of the statute 9 & 10 W. 3. c. 15, which requires the application for setting aside an award under that statute to be made before the last day of the next term after such award made: yet *the Court* thought at first that the practice had been to regulate their own discretion, with respect to motions for setting aside awards made under orders of *nisi prius*, with reference to the limitation of time prescribed by the statute. But on *Wigley's* referring to *Anderson v. Cozeter*, 1 Stra. 301, where the limitation of the statute was holden not to extend to an award made under a rule of *nisi prius*, by which he said, the practice had hitherto been regulated in similar cases.

The Court acquiesced, and permitted him to state his affidavits in support of the motion: but being ultimately of opinion that no sufficient ground was laid for disturbing the award, no rule was made.

Scott v. Scholey and Another.

8 East, 467. June 6, 1807.

A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of *feri facias* at the suit of a judgment creditor.

THIS was an action on the case against the defendants, as sheriff of *Middlesex*, for a false return of *nulla bona* to a writ of *feri facias* issued upon a judgment of *Michaelmas* term 1792, for 1600*l.*, at the suit of the plaintiff, against the goods and chattels of *George Coleman*; indorsed to levy 1300*l.* besides poundage, &c.: to which the defendants pleaded the general issue: and a verdict for 1300*l.* having been given for the plaintiff at the trial at the sittings at *Westminster* after *Hilary* term 1806, which was moved to be set aside in the following term, the following facts were agreed to be put in the form of a case for the opinion of the Court.

On the 10th of *July* 1795, an indenture of lease was granted by *G. Moore* to the said *George Coleman* of the *New Theatre* and some adjoining premises in the *Haymarket*, in the county of *Middlesex*; to hold to *Coleman* from *Lady-day* then last for 17 years, at the yearly rent of 400*l.* On the 13th of *Aug.*

(1) Vide *The King v. Nicholson*, 12 East, 330.

(a) Vid. *Rez v. The Company of Proprietors of the Staffordshire and Worcestershire Canal Navigation*, 8 Term Rep. 340, and *Rez v. Leeds and Liverpool Canal Company*, 5 East, 325, and the cases there cited, as to the place of rating where the profits become due or are paid.

gust 1795, another lease was granted by *J. Mucklow* to *Coleman* of a piece of ground and premises in *James-street* in the *Haymarket*, to hold from *Midsummer* then last for 16 years, at the yearly rent of 31*l.* 10*s.* On the 8th of *September* 1795, by a deed of assignment made between *Coleman* of the 1st part, *G. Wathen* and *S. Arnold* of the 2d part, and *W. Morland*, *F. Const*, and *T. Holloway* of the 3d part, *Coleman* (with the consent of *Wathen*, *Arnold*, and *Const*) assigned to *Morland*, *Const*, and *Holloway* the said theatre and other premises comprised in the said two leases for all the time then to come therein: and *Coleman* by such deed also assigned to them the wardrobe, dresses, ornaments, music, musical instruments, compositions, and pieces, and all copyright, property, and interest of his deceased father, in all plays, &c. dramatical, musical, or other pieces, the property of the said theatre, upon trust to grant certain annuities; which were accordingly granted, but which determined on the 15th of *October* 1804; and to make certain payments, which were accordingly made; and with an ultimate trust for *Coleman*, his executors and assigns. By two several indentures indorsed on the last mentioned deed of assignment *Coleman* charged his interest in the said trust premises with certain sums of money; all which were paid off and discharged before the 13th of *October* 1804, except two several sums of 800*l.* and 273*l.*, with an arrear of interest thereon, due to *T. Holloway*. By another indenture of assignment, dated the 13th of *October* 1804, also indorsed on the same deed, and made between *Coleman* of the 1st part, *W. Jewell* of the 2d part, and *Morland*, *Const*, and *Holloway* of the 3d part; after reciting that the trusts of the former assignment of the 8th *September* 1795 had been executed without any sale of the trust premises, and that the sums secured by the before-mentioned deeds, except those due to *Holloway*, had been paid out of the rents, profits, and produce of the trust premises; *Coleman* assigned to *Morland*, *Const*, and *Holloway*, the said theatre, leasehold premises, and other effects assigned by the former assignment, discharged from the trusts of that assignment and the indentures indorsed thereon; but upon trust to pay the bills of certain tradesmen employed by the trustees on account of the theatre, amounting to 1400*l.*: and after payment thereof, upon trust for paying to *Holloway* 2202*l.* 8*d.*, and to *Jewell* 4044*l.* 5*s.*, and afterwards in trust for *Coleman*, his executors, &c. Previous to the 4th of *June* 1805, *Coleman* contracted with *D. E. Morris* for the sale to him of one undivided fourth part of his term in the said theatre and leaseholds, and of the machinery, wardrobe, dresses, musical and other instruments, books, copy-right, and other theatrical stock and property at such theatre, for 3500*l.*; and also contracted with *P. Tahourdin* and *J. Winston* for the sale to them of another undivided fourth part of the same property, at the like price of 3500*l.* On the 4th *June* 1805, by indenture of nine parts, between *Morland*, *Const*, and *Holloway*, of the 1st part, *Jewell* of the 2d part, *Coleman* of the 3d part, *Catherine* his wife of the 4th part, *Morris* of the 5th part, *P. Tahourdin* and *Winston* of the 6th part, *J. Neeld* of the 7th part, *F. Fladgate* of the 8th part, and *G. Tahourdin* and *J. Stuart* of the 9th part; after reciting the leases and other deeds, circumstances, and contracts above set forth, to the effect above stated; and that at the time of entering into the contract with *Morris*, it had been stipulated by him as the brother of *Cath. Coleman*, and agreed to by *Coleman*, that some provision should be made for the said *Catherine* his wife (she then living separate from her husband) out of the profits and produce of the remaining two-fourth parts of the said property to be retained by her husband; but that such remaining moiety should stand as an indemnity to the said *Morris*, *P. Tahourdin* and *Winston*, against all claims upon them, or the shares purchased by them, by the said *Catherine*, or the tradesmen or other creditors or claimants of *Coleman*: and reciting that all the trusts of the several recited deeds had been fully performed except the payment of 2272*l.* 17*s.* 9*d.* to *Holloway*, and 4173*l.* 1*s.* 8*d.* to *Jewell*, and the payment of the tradesmen's bills in respect of the theatre and trust premises:

upon payment whereof no incumbrance would remain upon the said property, except the rents payable under the leases, and the charges to be made under that present indenture: and reciting, that to provide a fund for payment of the tradesmen's bills, *Coleman* had applied to *Neeld* to advance him 1233*l.* 14*s.* 5*d.*, at interest, for six months; and had agreed that such sum and interest should be secured as after mentioned; and that *Neeld* had advanced the money, which was to be paid to *Morland*, *Const*, and *Holloway*, to be applied as after mentioned: and reciting that it had been agreed that 1272*l.* 17*s.* 9*d.* part of the money so due to *Holloway* and the whole of the money so due to *Jewell*, should be paid out of the purchase monies; and that for the security of the purchaser's judgments, which had been confessed for securing to *Holloway* and to *Jewell* their said debts, should be assigned to *G. Tahourdin*, upon trust to keep such judgments on foot as a paramount security and protection to the purchasers respectively; *P. Tahourdin* and *Winston* having agreed to secure the payment to *Holloway* of 1000*l.* the remainder of the said debt: it was witnessed, that in consideration of 3500*l.* by *Morris*, and of 3500*l.* by *P. Tahourdin* and *Winston*, and of 1233*l.* 14*s.* 5*d.* by *Neeld* at *Coleman's* direction paid to *Morland*, *Const*, and *Holloway*; amounting together to 8233*l.* 14*s.* 5*d.* out of which, was to be paid (and was paid) at the execution of the deed to *Holloway* 1272*l.* 17*s.* 9*d.* in part of his debt; the remaining 1000*l.* being agreed to be secured (and in fact since paid) by *P. Tahourdin* and *Winston*; and to *Jewell* 4173*l.* 1*s.* 8*d.*; and 1787*l.* 15*s.*, residue of the 8233*l.* 14*s.* 5*d.*, or a competent part thereof, was to be applied in payment of tradesmen's bills; and the surplus (if any) to *Neeld*, in part discharge of the sum advanced by him: *Morland*, *Const*, and *Holloway*, assigned, and *Holloway* and *Jewell* respectively released, and *Coleman* assigned and confirmed, to *Neeld* and *Fladgate*, the said theatre, leases, wardrobe, &c. and other trust premises, and all *Coleman's* dramatic works and compositions, and all other the estate, goods, chattels, effects, and property, whereof *Coleman*, or any other in trust for him, was possessed or entitled to in the said theatre or otherwise, so in respect thereof discharged from the trusts of the before mentioned indentures; but upon the following trusts, viz. 1st, as to the 1787*l.* 15*s.* to pay the bills then due for workmanship, &c. at the said theatre, but not any of *Coleman's* private debts; and the residue, if any, to *Neeld*, in part discharge of the money advanced by him. And as to the premises assigned to *Neeld* and *Fladgate*, upon trust to pay the rents reserved by the said leases, taxes, and insurance from fire; and to indemnify *Morland*, *Const*, and *Holloway* against all actions, &c. in respect to their having acted as trustees under the deed of the 8th September 1795, or having executed that indenture: and subject thereto as to one undivided 4th part, in trust for *Morris*; and as to another undivided 4th part, in trust for *P. Tahourdin* and *Winston*, as tenants in common: and as to the remaining two undivided fourth parts, the assignment made by the said deed was thereby declared to be, upon trust out of the rents, profits, and annual proceeds, to pay the remainder of the debt, if any, then due to *Neeld*; to indemnify *Morris*, *Tahourdin* and *Winston*, against the payment of the ground rents, tradesmen's bills, and other claims, beyond their due proportion of the reserved rents; to raise an annuity of 300*l.* for *Catherine Coleman* during the joint lives of her and *Coleman*; and afterwards, in trust for *Coleman*, his executors, &c. And subject to the said several trusts to permit and suffer *Coleman*, *Morris*, *P. Tahourdin*, and *Winston*, or the three last-named persons only (in case it should appear of *Neeld* and *Fladgate* adviseable on account of *Coleman's* debts to exclude him for a time) to have the full use and enjoyment of the said theatre and trust premises, for the purpose of rendering the same as productive as possible. The judgments to *Holloway* and *Jewell*, were by the same deed assigned for the purposes mentioned in the recital: and *G. Tahourdin* and *Stuart* were empowered by *Holloway* and *Jewell* to issue executions on them, so as to keep out any other execution against the property

by any other of *Coleman's* creditors; and also to acknowledge satisfaction on record. The whole of the consideration money stated in this deed was paid and applied in the manner therein described; and *Coleman's* interest in the unsold moiety of the leasehold theatre, machinery, wardrobe, and instruments, was worth more than the incumbrances charged on it and the amount of the plaintiff's execution. The plaintiff's judgment and writ of *feri facias* were regularly proved: and on the 19th of *June* 1805, the defendants, then sheriffs of *Middlesex*, entered the theatre under such writ, and continued in possession until the middle of *September*, at the request of *Neeld* and *Fladgate*, who, on the 20th of *June* 1805, delivered to the sheriff a copy of the deed of the 4th of that month before stated. On the 10th of *September* 1805, the defendants served the plaintiff with notice of taking an inquisition by a jury concerning the property in the said theatre; but *Neeld* and *Fladgate*, together with *P. Tahourdin*, having indemnified the defendants for returning *nulla bona* to the plaintiff's writ, the defendants withdrew from the said theatre, without taking any inquisition; and in *Michaelmas* term made a return of *nulla bona* on the plaintiff's *feri facias*. The question for the opinion of the Court was, whether or not under the above circumstances the plaintiff were entitled to recover: if he were, the verdict was to stand: if not, then a new trial was to be granted. The case was argued in *Easter* term last by

Marryat for the plaintiff. The question is, Whether the equitable beneficial interest, concurrent or residuary, which *Coleman* had in the term of years in the theatre and other property comprized in the trust deed of the 4th of *June* 1805, were subject to be taken and sold by the sheriff under the writ of *feri facias* issued against *Coleman* at the suit of a judgment creditor? Strictly speaking, *Coleman* had not a mere equity of redemption on payment of present incumbrances, but rather a partial present interest in the term. He, in conjunction with three others, is by the terms of the trust to have the full use and enjoyment of the property, unless the trustees shall see reason to exclude him for a time, on account of his debts: and the funds out of which the incumbrances and charges are to be paid are "the rents, profits, and annual proceeds." The subject-matter, therefore, of the execution is a chattel interest held in trust for the immediate benefit of the debtor, and not a mere ulterior modification of such an interest. And the question, in this view of the case, will be, Whether the trust can protect such an interest from common law process against the debtor? There is no case, however, at law which has decided that even an equity of redemption may not be taken in execution. It may be admitted, that it cannot be taken under an *elegit*; and that the 10th section of the statute of frauds, by which the trust of an inheritance is made assets at law, does not extend to the case of a trust of a term of years; (the Legislature, as he contended, having then considered that the trust of a term was seizable before, and therefore wanted not their aid to make it so;) yet there is a great difference between an *elegit* and a *feri facias*; the former is process given by statute, Stat. Westm. 2. 13 Ed. 1. c. 18, which must therefore be executed with all statutable qualifications: but the latter is a common law process executable upon all goods and chattel interests, without restraint: and it lies on the other side to shew that a partial interest in a chattel is not seizable from the nature of the writ; the very form of which shews that it is not necessary for the goods or chattels sold under it to be within the corporal touch of the sheriff at the time; for it commands him to *cause to be made* of the goods and chattels of the defendant the sum recovered. [Lord *Ellenborough* observed, that the terms of the subsequent process of *venditioni exponas* seemed to imply that the sheriff should have made an actual seizure before sale. And *Lawrence*, J. adverted to *Jeanes v. Wilkins*, 1 Ves. 195, where Lord *Hardwicke* held that a sale of a leasehold by the sheriff, under a *feri facias*, was good, without any *venditioni exponas* issued.] In every case where a legal term is taken in execution, it is the *interest* of the debtor in the term which

is taken and sold, and not the land itself or the indenture of demise. The deed is only *evidence* of the right, and not the right itself. [Lawrence, J. asked if he meant to contend that the sheriff could by virtue of the writ sell cattle or other goods of the defendant in the execution, merely by making out a bill of sale of them in his office to the purchaser without having first made an actual seizure of the property; and leave the other afterwards to bring his action of trover?] There is a distinction in this respect between things which pass by *delivery* and by *assignment*. There can be no delivery of a term; it can only pass by assignment. Suppose the indenture to be lost, or purposely withheld by the debtor, the sheriff cannot make even a symbolical seizure of the term. The law however, has contemplated this difficulty; and therefore it is sufficient for the sheriff to assign to the vendee *all the interest* of the party, in general terms: for, says the Court in *Palmer's case*, 4 Co. 74, and Cro. Eliz. 584, the sheriff "by common intendment cannot have precise knowledge of the beginning and end of the term, not having means to be informed thereof." And this was recognized in *Taylor v. Cole*, 3 Term Rep. 292, where it was held sufficient for the sheriff, in pleading the taking of a term under a *fi. fa.* to state that the party was possessed of a *certain interest* in the residue of a *certain term of years*; without stating what that interest was; although it was objected that it might be any other interest than the term itself. [It was observed by the Court, that Lord Kenyon's words there were, "that the plaintiff was in possession of a certain term: and that it was impossible to suggest any possession of a term that was not the subject of seizure by the sheriff under a *fi. facias*. From whence it might be presumed that he meant to speak of a *legal possession* by the termor.] The same difficulty would apply in full force in the case of an execution against the tenant of a legal term in an incorporeal hereditament, or in a lease by parol for three years; which no doubt might be assigned by the sheriff, and yet are not capable of actual seizure. But whatever the inconvenience may be, where the sheriff has no certain means of ascertaining to the vendee what the debtor's interest in the term is, for want of the deed; the debtor himself who withholds the necessary information will be the only sufferer; as his interest will sell for so much less on account of such uncertainty. The difficulty, however, of a seizure and sale by the sheriff of an equitable interest in a term is not greater than in many cases of legal interests which are clearly vendible by him. The interest of one tenant in a joint chattel may be taken in execution on a *fi. fa.*; (a) and yet the co-tenant cannot be dispossessed of it, nor can his share be sold without his consent. So here the sheriff might have sold Coleman's partial interest in the theatre, without affecting the possession of the trustees or the interests of the other parties to the deed. Goods pawned may be taken in execution against the pawner upon satisfaction of the pledge, Bro. Abr. Pledges, pl. 24. And though it be said, Bro. Abr. Pledges, pl. 24, and tit. Execution, pl. 107, that in the case of a lease of land and of a stock of cattle for a year, they cannot be taken in execution during the term: that is, because the lessor himself could not have dispossessed his tenant during the year; and of course the lessor's creditor cannot. But, subject to the right of the pawnee in the one case, and of the lessee in the other, the goods may be taken: and if a rent were reserved to the lessor, the debtor, out of the chattel, such rent might presently be taken in execution. In *Cadogan v. Kennet*, Cowp. 432, the household furniture vested in trustees, in trust for the husband for life, remainder to the wife for life, &c. were held amenable, as to any rent which was made of them, to the husband's creditors during his life. [The Court said, that was only an equitable arrangement at *nisi prius*.] The same difficulty did not occur here as existed in that case: for the sheriff here was not required to dispossess any other person entitled to the possession; but only to

(a) *Bezhurst v. Clinkard*, 1 Show. 169. (173). and *Eddie v. Davidson*, Dougl. 650.
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sell subject to the rights of all those who had concurrent or prior claims. It seems difficult to distinguish in this respect the case of an interest of this description from that of any legal reversionary interest in a chattel, which may doubtless be sold under a *fi. fa.* : as if a lessee for a long term of years underlet ; that will not protect the original lease from being taken in execution during the sub-term, subject to the undertenant's interest : and yet there is nothing for the sheriff to deliver possession of. And it can make no difference in that respect whether the sheriff get possession of the deed or not, any more than in the case of an execution against the sub-tenant in possession. [*Lawrence*, J. referred to *Plunket v. Penson*, 2 Atk. 294, where Lord Hardwicke says, that "if there be a mortgage for 1000 years, and the reversion in fee left in the mortgagor, it will be legal assets; because the bond creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion come into possession. But where it is a mortgage of the whole inheritance, he did not see what remedy a bond creditor could have to make it assets at law.] That would be leaving the debtor to enjoy the property in the mean time. But it seems more reasonable to say, that whatever interest the debtor himself may sell, the sheriff may also sell; although it may not be capable of actual seizure and delivery. As in *York v. Twine*, Cro. Jac. 78, an annuity granted by the crown under the great seal, and payable by the receiver in the Court of Wards, was sold by the sheriff under a writ of *fi. fa.* ; and held well. Great inconvenience and prejudice to creditors will ensue if equitable interests are held to be exempt from common law executions. A large mass of property is enjoyed under executory contracts. Lands are often held, especially for the purpose of building, under an agreement for a lease, which is seldom granted till all the houses are built, and frequently the tenants rest satisfied with such equitable demises. All this property will be out of the reach of the Courts of Law. Besides which, any person possessing a chattel interest of however great value, may prevent its being taken in execution for his debts by mortgaging it for a small sum, and thereby converting his present legal into an equitable reversionary right, although he would continue in the complete enjoyment of it as before. And arguments *ab inconvenienti* are always allowed to have weight in the absence of express authorities against them.

Richardson contra. There is no authority to shew that any other than a legal interest can be taken in execution under the legal common law process of *feri facias* : and therefore the general rule applies, that where there is no legal right, there is no legal remedy. All the cases cited of joint chattels, annuities and terms for years, taken and sold by the sheriff, are plainly cases of legal interests : and the latitude allowed to the sheriff in the general terms of his assignment is no more than what holds in all cases of pleading title in a stranger, of which the party is not presumed to have such certain knowledge as of his own. The turn of expression used by Lord *Kenyon* in *Taylor v. Cole*, 3 Term Rep. 295, speaking of the possession of the term, shews that it was with reference to a legal interest. The principal question, however, in that case turned upon the *expulsion*, whether that were laid as matter of aggravation only to the breaking and entering, and covered by a justification of the latter ; or as a substantive trespass : and the Court held it to be only aggravation. The cases of the pawnee and lessee mentioned in Bro. Abr. Pledges, pl. 24, and Execution, pl. 107, as far as they go, make rather against the plaintiff's argument ; for they shew that the sheriff could not take the pledge in the one case, nor the cattle in the other, until the intervening interest of the pawnee and lessee were satisfied or expired. It may however be admitted, that a legal reversionary interest in a chattel, after a sub-term of years, is a saleable interest by the sheriff ; but it does not follow that an equitable interest is also saleable. And in *Cadogan v. Kennett*, Cowp. 432, all the points in judgment were decided in favour of the trustees against the execution creditor of the *cestui que trust* : and the goods taken and not sold were

directed to be restored to the trustees ; though as to those which were sold an equitable arrangement was entered into ; which could only have been done by consent : yet it was clear that the debtor had an equitable interest in the property for his life. On the other hand, there are many authorities to shew that a judgment creditor must go into a court of equity in order to get possession of the equitable interests of his debtor. There is a distinction indeed in those Courts between what are there called *legal* and *equitable* assets ; and sometimes the former denomination is applied to interests vested in trustees : but that is to be understood where the trusts are so plain that there needs no direction of the Court how they are to be executed. There, though they can only be got at in a Court of Equity, yet, when obtained, they are marshalled and applied as *legal assets in a course of administration*. Equitable assets on the contrary are such as are distributable equally *pro rata* amongst all the creditors, whether by simple contract or specialty, according to the equitable discretion of the Court. The denomination therefore of *legal* assets, in the books of equity, means no more than such assets, as, though arising out of equitable interests, are always legally distributed by a Court of Equity in a course of administration. Sir *Charles Cox's* case, 3 P. Wms. 341, and *Wilson v. Fielding*, 2 Vern. 763, establish this distinction, and shew the grounds of it. Now these are only equitable assets ; such as a court of equity, in case of *Coleman's* death, would distribute *pari passu* amongst all his creditors, and not in a course of administration. They are always so considered wherever the charges are uncertain, and an account must be taken, or protection is to be extended to other interests than those of the creditor. And in *Hartwell v. Chitters*, Amb. 308, Lord *Hardwicke* expressly held that the equity of redemption of a leasehold was equitable assets. And *Lyster v. Dolland*, 1 Vez. jun. 431, and 3 Bro. Ch. cas. 478, is the judgment of a court of equity, that it cannot be taken in execution at common law. In a case of doubt, it is an argument against the authority of the sheriff to seize and sell such an interest as this, that the creditor will not be in a better situation after the sale than before ; for the sheriff could only sell subject to the trusts ; and therefore the act would be nugatory, after all the expence of it incurred. The execution creditor, or the vendee, would still be obliged to go into equity to get an account, or to redeem prior incumbrances : which may be done in the first instance by a judgment creditor with less expence and delay. Besides the destruction of the debtor's estate ; which under so much doubt and difficulty would sell greatly under value : so that a large equitable interest might be exhausted in satisfaction of a small demand to the detriment of other creditors. Again, if one equitable interest may be taken and sold, another, behind the first, may be taken also. And if the rights of all these parties could not be decided at law, still less can they be decided by the sheriff : and in cases of intricate and complicated equities, the Courts of Law could not know whether the sheriff had made a false or true return. And questions, of which the Courts of Law could not take original cognizance, would thus be brought consequentially within their jurisdiction. In *Burdon v. Kennedy*, 3 Atk. 739, Lord *Hardwicke's* opinion is express, that a *fiery facias* would not affect an equity of redemption of a leasehold, but that the judgment creditor must come into equity. Now this, though not a mortgage, must be governed by the same rule : it is a charge to pay off debts, and *Coleman* has only a resulting equity after payment of the debts. And in *Preston v. Christmas*, 2 Wils. 86, an equity of redemption was said to be nothing in the eye of the law.

Marryat in reply said, that the cases in equity concerning the marshalling of assets had no bearing on this question. And that the expressions made use of in some of them, as to the necessity of creditors going into equity, were with reference to cases of testacy and of intestacy. In *Sharpe v. The Earl of Scarborough*, 4 Vez. jun. 538, it was said, that Sir *Chs. Cox's* case applied only to bond, and not to judgment, creditors ; and that as to the latter, it was

not to be considered as equitable assets: and both that case and *Hartwell v. Chitters* were considered to have been overruled. He also referred to *Morrice v. The Bank of England*.^(a) As to the difficulty of the sheriff's seizing an equitable interest, the same difficulty exists now where there are two executions out against the same property: for after the first seizure, there remains nothing but a trust to seize under the second execution. And if the value of the property seized be sufficient to satisfy all the prior claims, the difficulty of apportionment will not arise. But all that the execution creditor or the vendee could claim in this case was to stand in the same situation as *Coleman* himself, with respect to this property; which would not interfere with the rights of any third persons. If indeed he wished to redeem the prior incumbrances, he must file his bill in equity. The mere uncertainty of the extent of the prior or concurrent charges will not make these equitable assets: as in *Allan v. Heber*, 2 Stra. 1270, a devise of land to the heir, subject to payment of debts, was deemed assets at law. And here he contended, that *Coleman* had a partial present interest in the term, and not a mere equity of redemption.

Lord ELLENBOROUGH, C. J. said that the case involved a question of great magnitude and extent, upon which it was proper for the Court to deliberate before they pronounced their judgment. The case therefore stood over till this day, when his lordship delivered the opinion of the Court.

This was an action on the case against the defendants, as sheriff of *Middlesex*, for a false return of *nulla bona* to a writ of *feri facias* against the goods and chattels of *George Coleman*, Esq., which was tried before me, and in which a verdict was given for the plaintiff. Upon a motion for a new trial, it was ordered that the facts should be stated in the form of a case for the opinion of the Court. [After stating the material facts of the case his lordship proceeded.]

The question of law arising out of these facts is, whether the residuary beneficial interest of Mr. *Coleman*, under the trusts upon which a lease for years in the new theatre in the *Haymarket*, and the apparatus, &c. belonging to the same had been assigned, and which remains to him, after satisfying the several debts and incumbrances thereupon, and indemnifying the trustees acting under the trust deed, were liable to be taken in execution by a writ of *feri facias* for the debt of the plaintiff, a judgment creditor? Which question in other and fewer words amounts to this, viz., whether an equitable interest in a term of years can be sold under a *feri facias*? The sheriff's authority is derived under a writ, by which he is commanded to *cause to be made* of the goods and chattels of the defendant the sum recovered; and which sum is of course to be made by a sale of the things taken under the execution. If the sheriff should not be able, before his writ is returnable, effectually to execute it in this particular, he is allowed to excuse himself by returning that *the goods remain in his hands unsold* for want of buyers: upon which another writ issues, commanding him to *expose to sale the goods so remaining in his hands unsold*. The language of these writs and return evidently imports, that the goods and chattels, which are the object of them, are properly of a *tangible* nature, capable of *manual seizure*, and of being detained in the sheriff's *hands and custody*, and such also as are conveniently capable of sale and transfer by the sheriff to whom the writ is directed, for the satisfaction of a creditor. The legal interest in a term of years, both in respect of the possession of which the leasehold property itself is capable, and also in respect of the instrument by which the term is created and secured, (both of which are capable of delivery to a vendee,) has been always held to answer the description of the writ, and to be saleable thereunder. (*Dyer* 363. a.) But no single instance is to be found in the history and practice of the courts of com-

(a) Cas. Temp. Talb. 217. 4 Bro. P. C. 287. And to Mr. Cox's note 3 P. Wms. 401.

mon law, in which an equitable interest in a term of years has ever been recognized as saleable, (seizable of course it cannot be,) under a *feri facias*. Besides, what locality belongs to an equitable interest, a resulting trust, for instance, in a term for years, so as to render it more fitly the subject of execution and sale by the sheriff of any one county than another? The degree of inconvenience which would attend the sale of such interests by the sheriff, although it would in strictness afford no argument against an ascertained legal power of the sheriff on such a subject, is a sufficient reason why the Court should anxiously watch the extension of such power in a case in any respect doubtful. What means, in any degree adequate, has the sheriff of taking an account of the actual amount of the incumbrances thereupon, or of ascertaining the extent of the indemnities which the trustees may be entitled to claim? The sale of such an interest, if it were to be made at all by the sheriff, must necessarily be made under circumstances of still greater ignorance and uncertainty as to its value, than attend sales of any other description of property; and not only without any legal means of delivering a present possession of the thing sold, but in general without having even the type or instrument of any legal interest whatsoever, present, or future, in the subject of such sale, to exhibit to the sight, or deliver to the hands of a purchaser. It has indeed been urged in argument, as an inconvenience on the other side, if such equities of redemption in chattel interests shall be held not to be saleable under an execution; that, by means of a mortgage of the largest leasehold property for the smallest sum imaginable, such property might be effectually protected and withdrawn from the legal claims of every creditor. But the inconvenience in the case put does not extend beyond the necessity, which such a step would occasion, of resorting to a different remedy, to be applied in another court, upon a bill to be filed by the judgment creditor in such other court, for the purpose of obtaining it. In a Court of Equity he might be let in to redeem such mortgage incumbrances as stood in the way of his common law remedy by execution; or he might have a decree for the sale of the mortgage term itself, in satisfaction of his rights as an execution creditor. *Shirley v. Watts*, 3 Atk. 200, is an authority for this purpose: as is also the case of *Burdon and Kennedy*, 3 Atk. 739. In the case of *Lyster v. Dolland*, reported in 3 Bro. Chan. Cases 480, and 1 Vez. jun. 431, Lord *Thurlow* was at last of opinion that an equity of redemption of a term could not be taken in execution: though at first, under an apprehension that the language of the 10th sect. of the statute of frauds applied to such a case, he had inclined to hold otherwise. But the very silence of that statute, which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person against whom an execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood prior to the passing of that statute. In the absence, therefore, of any authority in favour of the sale of such an equitable interest under a common law execution against goods, we are of opinion, upon the grounds already stated, that the sheriff's return of *nulla bona* in this case, where the defendant in the execution had no other property besides the trust property in question, was not a false return; and of course that the verdict, which has been obtained by the plaintiff against the sheriff in this case, must be set aside, and a new trial granted.(1)(2)

(1) The principle of this decision was recognised by the Supreme Court of *New-York* in the case of *Wilkes & al. v. Ferris*, 5 Johns. 335. 343.

(2) ["The extent of the decisions in *Pennsylvania*,"—says Judge *Rogers*, in delivering the opinion of the Court in *Rickert v. Madeira*, 1 R. 329,—“as it will be found upon a critical examination of all the cases, is, to subject to execution all possible contingent titles in land, accompanied with an estate, property or real interest in the land, whether that interest be legal or equitable.”]

In *Massachusetts*, the interest of the mortgagee in the lands mortgaged cannot be taken

The Mayor, Aldermen, Bailiffs, and Citizens of Carlisle v. Blamire and Tyson.

8 East, 487. June 6, 1807.

The devise of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant, as assignee of *all the estate, right, title, and interest*, of the original covenantor. Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* declared on, were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment; held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact.

IN covenant the declaration stated, that the city of *Carlisle* from time immemorial has been an ancient city, and the citizens incorporated by *divers names of incorporation*, and that at the time of making the indenture after-mentioned, they were known by the name of the *mayor, aldermen, and capital citizens* of the city of *Carlisle*, in the county of *Cumberland*, and are now, and for divers, ss. 100 years last past have been, called and known by the name of the *mayor, aldermen, bailiffs, and citizens* of the city of *C. &c.* That one *G. Denton* being seised in fee of the lands called *Dentonholme*, by indenture of the 10th of *November* 1654, between him and the said body corporate, by the name of *T. Monke mayor, and the aldermen and capital citizens of C. in the county of Cumberland*, in consideration of 70*l.* &c. granted, bargained, and sold to the latter and their successors so much of the river *Caldew*, running through his lands called *Dentonholme*, in the city of *Carlisle* as should be sufficient for the grinding of corn at all times at the mills of the said city called the *City Mills*; rendering the yearly rent of 3*l.* And *G. Denton* thereby covenanted for himself, his heirs, &c. with the said then mayor, &c. that he, his heirs or assigns, or any other person or persons whatsoever claiming by, from, or under him, should not at any time thereafter divert or obstruct, &c. any part of the said water granted as aforesaid, &c. By virtue of which grant, the said citizens, by their name of incorporation above-mentioned, became, and from the making of the said grant hitherto have been lawfully entitled, &c. and the said mayor, aldermen, bailiffs, and citizens still of right ought to have the benefit of so much of the river *Caldew* as is granted to them, &c. The declaration then alleged, that on the 1st of *February* 1798, *all the estate, right, title and interest of the said G. Denton* of and in the said lands in the indenture mentioned, called *Dentonholme*, came to and vested in the defendants by assignment thereof; by virtue of which assignment they entered, and became seised thereof in fee. And then it assigned for breach, that the defendants wrongfully and injuriously kept and continued a certain wear before then wrongfully and injuriously erected across the river *Caldew*, near the *City Mills*, and higher up in the stream, and diverted the water, &c. whereby the mills became less serviceable, &c. The defendants, after craving oyer of the indenture, pleaded, 1st, that it was not the deed of the said *G. Denton*; 2dly, that the citizens of *Carlisle* were not at the time of making the said indenture, nor ever have been, a body corporate in deed or in name by the name of the *mayor, aldermen, and capital citizens* of the city of *Carlisle*, in the county of *Cumberland*; 3dly, the like plea, omitting the latter words in the county of *Cumberland*; 4thly, that the citizens, &c. were not at the time of making the said indenture, nor have ever been known by the

in execution, unless he have entered for the condition broken. *Blanchard v. Colburn*, 16 Mass. 345. The above case of *Rickert v. Madeira*, decides, that the mortgagee has not such an interest in the land as can be taken in execution.—W.]

name of the mayor, aldermen, and capital citizens of the city of *C.* in the county of *C.*; 5thly, the same as the last, omitting the latter words *in the county of C.*; 6thly, that *all the estate, right, title, and interest* of *G. Denton* in the said lands called *Dentonholme* did not come to and vest in the defendants by assignment. There were other pleas denying the alleged breach in different ways. Replication to the 2d plea, that the citizens of the city of *Carlisle* at the time of making the said indenture, *were a body corporate in name*, by the name of the *mayor, aldermen, and capital citizens* of the city of *C.* in the county of *C.* To the 3d plea, the like replication, omitting the latter description, "in the county of *C.*" To the 4th and 5th, that the corporation was not known by the respective names therein mentioned: on which issues were joined.

At the trial before *Sutton, B.* at *Carlisle*, in the summer of 1806, a deed was produced from the corporation chest of the 10th of November 1654, between *George Denton*, of the one part, and *Thomas Monke, mayor, and the aldermen and capital citizens* of the city of *Carlisle* in the county of *Cumberland*, of the other part; being the conveyance referred to in the declaration. The defendants objected to the variance between the name and description of the corporation in the deed, and in the declaration: which objection was overruled. They then submitted, before the merits of the cause were entered into, (a) that the action was improperly brought against them, as assignees of *all the estate, &c.* of *George Denton*; the same being vested in *J. Wilson*, as mortgagee in fee; (b) and the defendants being only seised of the equity of redemption, as devisees in trust under the will of *Lucy Dixon*, the heir of *Denton*. And they proved the indenture of mortgage: and rent paid to *Lucy Dixon*, as the owner of the equity of redemption of these premises during her life-time, and to the defendant *Tyson* as her representative or devisee since her decease. Upon this evidence the learned Judge, being of opinion that the plaintiffs had failed in proving a material averment in their declaration, directed a nonsuit. In *Easter* term last

Park and *Littledale* shewed cause against a rule for setting aside the nonsuit. As to the first point; the corporation sue by their present corporate name of the *mayor, aldermen, bailiffs, and citizens(c)* of *Carlisle* upon a grant made to the *mayor, aldermen and capital citizens* of *Carlisle*, who are *prima facie* a different body: and the issue is, whether at the time of that grant the citizens of *Carlisle* were a body corporate by the latter name; the proper evidence of which would have been the charter of incorporation, or secondary evidence of it, if lost or destroyed. But as that would not have answered the purpose, the plaintiffs relied on the grant itself, as evidence, at least against persons claiming under the grantor, that such was their corporate name at the time. But however this might have been evidence that the corporation were then *known* by such a name, if the issue had been whether they were known by the one name as well as the other; it is no evidence that they were in fact *incorporated* by the name mentioned in the deed. And where the misnomer of a corporation is in a material part of their description, advantage may be taken of it, even on the general issue, as in the case of the corporation of *Lynne*, 10 Rep. 122. There the corporation, by the name of the mayor and burgesses of *Lynne Regis, &c.* sued upon a bond given to them in that name by the defendant's testator: and a special verdict was found stat-

(a) It appeared in the course of the discussion of the case at the bar, that the defendants were trustees under the will of *Lucy Dixon*, widow, deceased, *inter alia*, of *Denton Mill* near the river *Caldew*; which is supplied by a cut from the river higher up than the corporation dam. That immediately below that cut was a wear, which was kept up by the trustees, and which, it was alleged by the corporation, wrongfully obstructed the flow of the water to their mills.

(b) It was agreed in the argument that the mortgagee was not in possession.

(c) They were incorporated by this name by a charter of the 13 Car. 1, about 17 years before the deed in question.

ing their true name of incorporation to be Major et Burgenses *burgi domini Regis de Lynne Regis*. And after much consideration the Court held the action to be well brought; because it was in sense and substance the same name, though different in words. But it was agreed, that if the variance had been substantial, (as in this case it must be admitted to be; omitting one integral part, and miscalling another;) it would have been fatal. A private person making a deed to others by a corporate name is no evidence at all that they are a corporation: and there can be no estoppel in such a case against the heirs of the grantor contesting their ancestor's grant; for then the cases upon the validity of such grants to corporations by wrong names, which have been held void, could never have arisen. These are collected in 2 Com. Dig. Capacity, B. 5. Estoppels must be reciprocal: but if the corporation had been sued by the defendants by the same name, they would not have been estopped from saying that they were not a corporate body by that name. 2dly, They insisted that the averment in the declaration, that *all the estate, &c. of G. Denton* in the lands came to the defendants, was disproved by the evidence that the legal fee was vested in the mortgagee, and the defendants were only devisees of the equity of redemption. In *The Earl of Derby v. Taylor*, 1 East 502, where lessees for lives granted *all their estate, &c.* to the defendant for 99 years, *if the lives should so long live*; this not being an assignment of the *freehold*, which therefore remained in the original lessees, though no more than a mere nominal interest, was holden not to be an assignment of the *whole* estate in them, so as to enable the reversioner, after the lives dropped within the term, to maintain covenant against the assignee for not delivering up the premises in good repair. It was indeed considered in *Eaton v. Jaques*, Dougl. 455, that the assignee of a term, assigned by way of mortgage, with a clause of redemption, not having taken actual possession, could not be sued for rent, as assignee of *all the estate, &c.* of the original lessee and mortgagor. But besides that that case seems to have been shaken in *Walker v. Reeves*, (a) which followed soon afterwards; and has since been questioned by Lord Kenyon in *Westerdell v. Dale*, 7 Term Rep. 312, and in *Stone v. Evans*; (b) it does not follow that the owner of the equity of redemption is liable as assignee of *all the estate, &c.* because a mortgagee was held not to be so. Perhaps it may be said, that neither of them have the *whole* estate: but if either have, it must certainly be that one who has the whole legal estate, according to *Plunket v. Penson*, 2 Atk. 290. And the corporation are not without their remedy; as they may have an action on the case against any wrongdoer, for obstructing their watercourse.

Upon the first point, Lord Ellenborough, C. J. said, that the question was, whether the corporation, being, as was admitted by the pleadings, a corporation by prescription, and having had various names of incorporation, might not have had [the corporate name attributed to it by the grant at the time it was made? And that the deed, as far as it went, was evidence to shew, at least as against the parties claiming under the grantor, that the corporation was then known by the name by which he had granted the watercourse to it: especially as this was not encountered by any other evidence. And Lawrence, J. observed that the issue was, whether the corporation were known by a certain name at the time when the ancestor, under whom the defendants claim, granted the watercourse to it: then surely the deed of that ancestor describing it by that name must be evidence against those who claim from him, that the corporation was then known by that name. Upon this point, therefore, the Court told the counsel for the plaintiffs that they need not trouble themselves: but should confine their answer to the second objection.

Cockell, Serjt., Wood, Holroyd, and Scarlett, in support of the rule, relied upon the authority of *Eaton v. Jaques*, Dougl. 455, as in point, that a mortga-

(a) Referred to in Dougl. 461. n.

(b) M. 39 G. 3, cited in *Turner v. Richardson*, 7 East 341.

gee cannot be charged as assignee, upon a covenant running with the land, until he has taken possession; which distinction reconciles all the authorities. And though that case has sometimes been doubted, it has never been overruled. It was admitted in *Walker v. Reeves*, after deliberation: the Court there considering a mortgage, not like an absolute assignment, but as a mere security for money; and it has been since recognized in *Jackson v. Vernon*, 1 H. Blac. 114, and in *Chinnery v. Blackburns*.^(a) The principle of the law too is with this distinction. At common law the party took nothing by a feoffment without livery of seisin; and a conveyance to uses vests^(b) nothing till attornment of the tenant in possession; though that, when made, may relate to the date of the conveyance. So the mere assignment of the lessee does not destroy the privity of estate between him and the lessor; but he still continues liable in debt upon the *reddendum*, (which is a local action founded on the privity of estate, and referable either to the county where the land lies, or where the deed was executed;) unless the lessor accept the assignee as his tenant, which is equivalent to attornment in other cases; after which indeed the privity of estate between the lessor and the original lessee is gone, though the latter be liable on his express covenant. For which they cited *Bellasis v. Burbreck*, 1 Salk. 209, and 1 Ld. Ray. 270; *Thrall v. Cornwall*, 1 Wils. 165; *Patterson v. Scott*, 2 Stra. 776, and *Thursby v. Plant*, 1 Saund. 240. All which shew that something more is necessary to give the action against the assignee than the mere assignment; and that both the original parties must agree before the relative situation of either can be altered. If this were not so, the greatest injustice would be done. An assignee of a lease might discharge himself from covenants running with the land, by making a secret mortgage or assignment of the legal estate, though still continuing in possession and enjoying the profits: and the lessor, knowing nothing of such a conveyance by the assignee, his lessee, would be defeated of his remedy on the covenant against him by surprise. Upon principle, therefore, as well as upon authorities, a mortgage is considered as nothing more than a pledge; and until the mortgagee enter into possession, the mortgagor is considered as complete owner, with respect to all other persons. And if the mortgagor be not liable on covenants running with the land, until entry, it follows that the mortgagor continuing in possession remains liable, inasmuch as he cannot by his own act deprive the covenantee of his remedy.

Cur. adv. vult.

Lord ELLENBOROUGH, C. J. now delivered judgment.

This was a motion to set aside a nonsuit before Mr. Baron Sutton at *Carlisle*, at the last assizes for the county of *Cumberland*, in an action of covenant brought against the defendants, "as assignees of *all* the estate, right, title, and interest of one *George Denton* in certain grounds called *Dentonholme*;" which *G. Denton* heretofore, by an indenture dated in the year 1654, had granted to the mayor, &c. of *Carlisle* so much of the river or water of *Caldew*, running along his lands and grounds called *Dentonholme*, as should be sufficient for the grinding of corn and grain at all times at their mills; with certain other liberties and powers for the use and advantage of those mills: and had covenanted that he, his heirs and assigns, &c. should not at any time or times thereafter turn, divert, straiten, or obstruct, or cause to be turned, diverted, straitened, or obstructed, any part of the said water granted as aforesaid. The breach was assigned in the defendants having, after these lands and grounds had vested in them by assignment, wrongfully and injuriously maintained and continued a wear or dam, before then wrongfully erected and placed in and across the river *Caldew*, which diverted the water to the prejudice of the plaintiffs' mills. To this breach the defendants, amongst other pleas, pleaded

(a) *B. R. E.* 24 G. 3, cited *ib.* 117.

(b) See *vide* Anon. *Cro. Eliz.* 46, and 2 *Blac. Com.* 332-6, and stat. 4 & 5 Ann. c. 16. s. 9 & 10.

in bar, that "*all the estate, right, title, and interest of the said Geo. Denton, of and in the said land, and grounds called, &c. did not come to and vest in the defendants by assignment thereof,*" in manner and form as the plaintiffs had alleged. Upon this an issue was joined. I forbear to state any of the other pleas, and the questions arising thereupon, as the Court has already disposed of them, upon the argument which took place in the course of last term, in favour of the plaintiffs. The question which the Court then reserved for its further consideration, and which was the point upon which the nonsuit at the assizes proceeded, is, whether this action were well brought against the defendants, as assignees of "*all the estate, right, title, and interest of Geo. Denton,*" the covenantor; it appearing that one *Jonathan Wilson* was, at and long before the time of the breach of covenant complained of, mortgagee in fee of the lands called *Dentonholme*; the defendants being only seised of the equity of redemption thereof, as devisees of one *Lucy Dixon*, the heir of *G. Denton*. Rent also appeared to have been paid to *Lucy Dixon*, the owner of the equity of redemption, in her lifetime, and to the defendant *Tyson*, as her devisee, after her decease. The learned Judge was of opinion that, under the circumstances stated, the allegation in the plaintiff's declaration, that the defendants were assignees of *all the estate, right, title, and interest of George Denton*, the covenantor, was not well proved; and the plaintiffs were nonsuited accordingly. And indeed, considering that the whole legal estate in the premises was, before and at the time of the breach of covenant in question, vested in *J. Wilson*, the mortgagee; and that the defendants, the devisees, were not assignees of any part of that legal estate therein which formerly belonged to *G. Denton*, the covenantor; but entitled to the mere equity of redemption thereof; it is impossible to say that the defendants were assignees of the estate of *G. Denton*, within the sense and meaning of the terms in which this issue is framed; and which terms respect that description and quality of estate alone, namely, legal estate, in virtue whereof parties are at all liable to actions of covenant, as assignees. Upon this view of the subject it is unnecessary to consider, whether *Wilson*, the mortgagee in fee, could, as such, be deemed liable upon this covenant, as assignee of the estate of the grantor *Geo. Denton*; and of course equally unnecessary upon this occasion to impugn or confirm the doctrine laid down in this Court in the case of *Eaton v. Jaques*, Dougl. 455. For whether a mortgagee, who has not entered, be, or be not liable to an action of covenant, as assignee; it is quite clear that the devisees of an *equitable estate*, (which is the only character which can be ascribed to the defendants upon this record) are not so. Upon this short ground, therefore, we are of opinion that the nonsuit must be sustained.

As to the point which was urged on the part of the plaintiffs, that the mortgage may be considered as void, as being a conveyance, within the stat. 13 Eliz. c. 5, "*devised and contrived of fraud, covin, &c. to the end, purpose, and intent to delay, hinder, or defraud a creditor of his just action, damages,*" &c.; it is sufficient to say, that the suggestion of any fraudulent or covinous contrivance or purpose, in respect to this mortgage, between the parties thereto, is perfectly gratuitous, and that it rests upon no apparent foundation of fact whatsoever. It does not however follow from what has been laid down, that the plaintiffs are remediless, in respect to the injury they may have sustained: it is competent to them, in part, to redress their own injury, by abating the nuisance which has been erected to the prejudice of their possessory rights. And although that privity of legal estate may be wanting, which will enable them to charge the defendants as assignees, in an action of covenant; they may still, in an action upon the case, if the facts will warrant it, recover against the defendants, as strangers and wrong-doers, a compensation for any prejudice done to the exercise and enjoyment of such legal rights, as the plaintiffs may be entitled to claim and exercise, and have heretofore enjoyed, under the deed in question: or they may maintain an action on the

covenant against the personal representative of *Geo. Denton*, the covenantor, if such representative can be discovered. At present, however, the rule *nisi* for setting aside the nonsuit in this case must be discharged.

The King v. The Inhabitants of Chatham.

8 East, 498. June 6, 1807.

Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another for a longer period in the parish workhouse.

UPON an appeal to the sessions against an order of Justices removing *Sally Burgoyne*, widow, from *Ashford* to *Chatham*, both in the county of *Kent*, the order was confirmed, subject to the opinion of this Court on the following case :

The pauper was married to her late husband *Robert Burgoyne* in the parish of *Clerkenwell*. A considerable time after their marriage her husband went to live in the parish of *Chatham*, where he exercised the trade of a cordwainer, sometimes as a master, and sometimes as a journeyman. But the pauper did not know whether he acquired any settlement in *Chatham*, or any where else. But knew that her husband more than once received relief from the parish of *Chatham* : that he was at one time a fortnight, at another a longer period in the workhouse of the said parish on account of illness ; and that he died in the said workhouse, and was buried at the expence of the parish. During all the times the said *R. Burgoyne* was so relieved by the parish of *Chatham* he was resident in that parish ; but the pauper, *Sally Burgoyne*, never resided with him there, (a) and never received relief from that parish, or gained any settlement there in her own right ; nor did she know where her settlement was. The appellants produced no evidence ; but relied upon the insufficiency of this evidence to support the order. The sessions were of opinion that this was sufficient evidence of *Robert Burgoyne*, the husband, being a settled inhabitant of the parish of *Chatham*, and therefore confirmed the order.

Bolland, in support of the orders, endeavoured to distinguish this case from *Rez v. Chadderton*, 2 East 27, because there was only one act of relief there to the pauper by the parish, while he resided in it, which might be well considered as casual relief, and therefore no evidence of his settlement there. And he admitted that he could not avail himself of *Rez v. Wakesfield*, 5 East, 335, as an authority in point to the present case ; the relief having been there given by the parish, which was on that account fixed with the settlement of the pauper, while he was residing in another parish ; and therefore it could not be attributed to their relief of him as casual poor. But he contended that the repetition and duration of the relief given in this case, without any removal of the pauper, furnished a much stronger inference against the parish, of the acknowledgment of the pauper being their parishioner, and could less be deemed *casual*, than the single act of relief in the first mentioned case. That if this were not evidence which it was at least competent for the sessions to consider, the same objection might be made to any continued course of relief ; which afforded the strongest presumption of settlement in the parish administering it.

Pitcairn contra, insisted that the act of giving relief, which it was as much the duty of the parish to administer to casual poor standing in need of it, as to their own parishioners, could not be considered as any evidence of the pauper's settlement there, unless it appeared clearly and unequivocally to have

(a) It was explained in the course of the argument, that she resided in the same parish, but not with her husband.

been administered as to a parishioner. That without saying that no continuance of relief could furnish such an inference, it was enough to say that no such inference could fairly arise from two instances, when it was determined in *Rex v. Chadderton* that one instance was not sufficient. The relief here was confined to the pauper himself, and was not extended to his family, and therefore carried more the appearance of casual relief. If a repetition of such assistance furnished evidence of settlement against a parish, it might be attended with injurious consequences to the poor.

LORD ELLENBOROUGH, C. J. On subjects of this sort it is important that there should be one uniform rule, as far as is consistent with law: and the rule having been laid down by Lord *Kenyon* in the *King v. Chadderton*, that the bare fact of giving relief to a pauper within the parish was no evidence of his settlement there, because it might be given to him as casual poor, it is proper to abide by it. In that case, indeed, the relief was only administered once; and it becomes necessary to consider whether its having been administered more than once, or several times, alters the case, and differs this in substance from the other; for each instance in itself might not be evidence of the settlement, and yet it might be difficult to say that several instances might not furnish the conclusion. At the same time, however, it is to be observed, that though the relief were given for any length of time, the inference may either be that the party receiving it was a settled inhabitant, or that his settlement could not be known. But that would bring it to an alternative case, on which the sessions might draw their own conclusion; and the difficulty would still exist. Upon the whole, therefore, it appears to me, as the better rule to adopt, that it does not amount to evidence of the settlement. And there would be great impolicy in admitting it to have any weight; for if the parish officers, by giving relief to a pauper, were to be making evidence against themselves, as to his settlement in their parish, it would make them perform their duty to casual poor with great reluctance. And therefore it is more consonant to humanity and policy, and to the rule of law laid down by Lord *Kenyon*, to say at once that it is no evidence of the settlement, than to leave it as a matter of inference in each case.

The other Judges concurring,

Order of Sessions quashed.

Holmes and Another v. Rainier.

8 East, 502. June 9, 1807.

A flag officer at the *Cape of Good Hope* sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic* seas, for the special purpose of getting her repaired; and the ship, after going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convey certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize, within the limits of a flag officer's command in the *Asiatic* seas, but in the course of rejoining her original flag-officer: Held that the latter was not entitled to the flag officer's 1-eighth share of the prize; his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command.

THE plaintiffs, as executors of Rear-Admiral Sir *Hugh Christian*, brought this action against the defendant, Rear-Admiral *Rainier*, for money had and received, and on an account stated since the death of the testator: and at the trial before Lord *Ellenborough* at *Guildhall*, a verdict was taken for the plaintiffs for 2700*l.* subject to the opinion of this Court on the following case; with liberty to refer to the several proclamations (a) in the present and

(a) By the proclamation of the 27th of *January* 1797, his majesty directs the distribution of prize thus; "the whole of the net produce being first divided into eight equal parts, the captain or captains of any of our ships of war who shall be actually on board

late king's reign, respecting prize-money, as part of the case. The action was brought to recover 1-8th of a prize, claimed to be due to Rear-Admiral *Christian* under the king's proclamation of the 27th of *January* 1797. The prize ship *Angélique* was taken near *Prince of Wales's Island* in the *East Indies*, within the limits of the command of R. A. *Rainier*, on the 8th day of *July* 1798, by his majesty's ship *L'Oiseau*, Captain *Linzee*. In 1797, Rear-Admiral *Pringle* was commander in chief of the king's ships at the *Cape of Good Hope*, and the defendant was commander in chief in the *Asiatic Seas*. The *L'Oiseau* was part of the squadron under the command of Rear-Admiral *Pringle*; and on the 22d of *June* 1797, was sent by him to the *East Indies* to be repaired; there being no possibility of repairing the ship at the *Cape*; with orders to return without loss of time, and join him at the *Cape*: and by letter dated 22d *June* 1797, he requested Rear-Admiral *Rainier* that the ship might be docked at *Bombay*. Captain *Linzee* arrived with his ship in *August* 1797 at *Madras*, where Rear-Admiral *Rainier* then was; reported his arrival to him, and received from him the following orders on the 8th, 26th, and 29th of *August* 1797. (a) (On the 8th.) "You are hereby directed to put yourself in his majesty's ship *L'Oiseau* under my command until further orders, and follow such orders as you shall from time to time receive from me for his majesty's service. And in case the ship you command shall be at any time detached from me on a particular service, on joining me again, you are to make a particular report of your proceedings in the form of a log book, instead of the usual mode of journal." (Signed) *P. R. &c.* (On the 26th.) "Whereas Rear-Admiral *Pringle*, commander in chief at the *Cape*, has, by letter dated the 22d of *June* 1797, requested that his majesty's ship *L'Oiseau* under your command should be docked at *Bombay*; but as the passage to that island at this time of the year is both difficult and dangerous, &c. you are therefore hereby directed to proceed to *Calcutta* for that purpose, and there get such repairs done, as shall be agreeable to the instructions received from Rear-Admiral *Pringle*, You are to procure vouchers for the works, &c. and also of all disbursements, for which you are to give bills on the proper officers, &c. and you are to take a duplicate of every disbursement for the information of your commanding officer, and also remit a counterpart thereof to me. On your arrival at *Calcutta*, you are to acquaint the Governor-General therewith; and request his assistance, &c. When ready for sea you are to make the best of your way to join Rear-Admiral *Pringle* at the *Cape of Good Hope*, or the Officer commanding there for the time being; waiting a reasonable time if necessary to take such ships under your convoy as may apply for your protection. And whereas his majesty's ship *Orpheus* is proceeding to the same port by my orders in a state of distress, you are to keep company with her until her arrival there; and, unless there should be a very pressing occasion for the immediate service of the ship you command, to allow her the preference of docking, &c. You will herewith receive a copy of Captain *Hill's* orders, to which you are to pay all due attention. In case there should be a necessity for your proceeding to sea together, after your mutual repairs are effected, from the alarm of enemies cruizers being on the coast, or any other purpose of sufficient importance to prevent you from returning to your station; always advising with his excellency the Governour General as above directed; you are to take Captain *Hill* under your orders in absence of any senior officer." (Signed) *P. R. &c.* (On the 29th.) "Notwithstanding what is contained

"at the taking of any prize shall have 3-8th parts. But in case any such prize shall be taken by any of our ships, &c. under the command of a flag or flags, the flag officer, or officers, being actually on board, or directing and assisting in the capture, shall have one of the said 3-8th parts; the said 1-8th part to be paid to such flag or flags-officers in such proportions, &c. as aftermentioned," &c. See the proclamation more at large in the case of *Harvey v. Cooke*, 6 East, 226.

(a) The substance only of the orders is here given.

in the preceding order, you are, when fit for sea, with four months' provision, to proceed from *Calcutta* to this road, to receive my further orders; completing your provisions," &c. (Signed) *P. R. &c.* Captain *Linzee* proceeded according to these orders, to *Calcutta*, where after many delays he completed the repairs of the *L'Oiseau*. On the 7th of April 1798, *R. A. Rainier* wrote to Captain *Linzee* the following letter, which Captain *Linzee* received at *Calcutta*. "*Suffolk, Tellicherry Road, April 7th, 1798*, Sir, I have received a copy of your letter of the 11th ultimo, in answer to which I acquaint you that provided this should find you in the river of *Bengal* or at sea, in company with the ships mentioned in Mr. Secretary *Barlow's* letter of March 7th, or with any other ships bound to the *Cape of Good Hope* or *England*, you are to make the best of your way with them to join your commanding officer; otherwise you may proceed to *Madras* road for the purpose mentioned in your letter, and where you will receive my orders for your future conduct." (Signed) &c. *P. R.* As soon as the repairs were completed Captain *Linzee* sailed in the *L'Oiseau* from *Calcutta*, for the purpose of rejoining his commander in chief at the *Cape of Good Hope*; taking under his convoy, according to the same letter, several homeward bound *East Indiamen*. From stress of weather the *L'Oiseau* was compelled to leave the *East Indiamen* at sea, and bear away for *Prince of Wales's Island*, where she made the capture of the *Angelique*, in the Asiatic Seas, within the limits of Rear Admiral *Rainier's* command, and sailed with her for the *Cape*, where the *Angelique* and cargo were duly condemned as prize and sold; and the flag 1-8th has been since received, as before stated, by the defendant. During all the time Captain *Linzee* was at *Calcutta*, he communicated the progress he made in repairing the ship, the obstacles he met with, and all other circumstances, to Rear Admiral *Rainier*, who sent copies of his letters to Rear Admiral *Pringle*. Captain *Linzee* also communicated to Rear Admiral *Rainier* the progress of his voyage to *Calcutta*, and the ships he had under his protection. He did not make such communication to the commander in chief at the *Cape*: the distance between the places being 1100 leagues; but on his return to the *Cape* he delivered to Sir *H. Christian*, commander in chief at the *Cape*, vouchers of all his disbursements on account of the aforesaid repairs; the bills for which were drawn in Captain *Linzee's* own name. Orders were issued for the recall of Rear Admiral *Pringle* from his command at the *Cape of Good Hope* on the — and received by him on the —. Rear Admiral *Christian* was appointed to succeed him, by orders dated 9th September 1797, and arrived at the *Cape*, and took upon himself the actual command before the capture in question, and was in such command at the time of the capture. The respective seniority of these three admirals was as follows; 1. Rear Admiral *Pringle*, 2. *R. A. Rainier*, 3. *R. A. Sir Hugh Christian*. The question for the opinion of the Court was, whether the plaintiffs were entitled to recover? If they were, the verdict was to stand: if not, a nonsuit was to be entered.

Dampier, for the plaintiffs, referred to Lord *Keith v. Pringle*, 4 East, 262, to shew that Rear Admiral *Christian*, who succeeded *R. A. Pringle*, after the latter had detached *L'Oiseau* from the *Cape* for the purpose of getting repaired, with orders to return again to his station, had the same right to the prize taken after his succession to the command by that ship on her return towards the *Cape*, as *R. A. Pringle* himself would have had, if he had retained the command. And then stated the question to be shortly this, whether the commanding flag officer on one station, who sends a ship of his squadron within the limits of another distinct command, for a particular purpose, be entitled to the 1-eighth of a prize taken by that ship within those other limits; or whether it belong to the flag officer within the limits of whose command it is so taken? In arguing which for the plaintiffs, he relied on the ship having been detached from the *Cape* for a special purpose, in the execution whereof the captain was all the time acting in obedience to his original com-

mander; and after that purpose executed, he was, in obedience to the same order, upon his return to this proper station, in the course of which the prize was taken. That this was not inconsistent with the captain's subjection to the temporary and collateral commands of R. A. *Rainier*, while he was within the limits of his command; and therefore the case might have been different if the prize had been taken under the actual direction or assistance of the latter. But that throughout the correspondence, R. A. *Rainier* recognizes that Captain *Linzee* was acting under the commands of the flag officer at the *Cape*, which he does not take upon him to revoke, but gives his own orders with reference to the original purpose so far as circumstances would admit of. That R. A. *Pringle* was alone responsible for sending the ship within the limits of R. A. *Rainier's* station, and not the latter; and that the flag officer's share of the prize, where he does not in fact direct or assist in the capture, is meant as a reward for his responsibility. That the words of the proclamation, "*directing and assisting in the capture*," were considered in Lord *Nelson v. Tucker*, 4 East, 252, 3, to be used in a large sense; and that it was enough if the capture were made by a detached ship while acting in pursuance of the order of her original flag officer.

Holroyd, contra, referred to the case of the *Orion*, 4 Rob. Adm. Rep. 362, to shew that a prize taken by a ship during a temporary suspension of the original command under which she was acting, though not totally separated from such command, precluded the original flag officer's claim to the 1-eighth: and, as he was proceeding to argue, transferred it to the flag officer under whose temporary command the prize was taken: though that being the case of a detached ship afterwards receiving distinct and separate orders from the admiralty, no question arose as to any other flag officer's share, but the whole was decreed to the captain.

On this part of the case, however, the Court gave no opinion: Lord *Ellenborough*, C. J. saying that it was a very different question whether R. A. *Rainier* were entitled, in case R. A. *Christian's* executors were not; which question it was not necessary to decide at present.

LORD ELLENBOROUGH, C. J. then continued—It is clear that the plaintiffs are not entitled to recover as the representatives of Sir *Hugh Christian*, who was neither on board Captain *Linzee's* ship at the time of the capture, nor virtually directing or assisting in it. Captain *Linzee* was indeed originally under the command of the flag officer at the *Cape*; but his ship had been sent out of that station, and within the limits of another commander, for the special purpose of obtaining repairs. When therefore the ship was sent out of the limits of the *Cape of Good Hope* station, there was a suspension of all command of the flag officer there, actual or virtual; and so it continued until she returned again within the limits of the same command. It might have been another question, if the commission granted to the commander in chief at the *Cape* had expressly authorized him to detach ships beyond the ordinary limits of that station for a special purpose: but there is no evidence of that sort laid before us. It is sufficient therefore to say that the plaintiffs are not entitled to recover the 1-eighth flag share; and it is unnecessary to decide whether Rear Admiral *Rainier* is entitled to it under these circumstances.

GROSE, J. agreed, that it was unnecessary to decide now upon R. A. *Rainier's* right to this share. It is sufficient to say that, the plaintiffs are not entitled. There is nothing in the proclamation to give the 1-8th share of the prize to the flag officer at the *Cape*. The capturing ship was not under his command at the time, and the prize was taken out of the limits of his station; and nothing is stated of the terms of his commission, to shew that his authority extended beyond those limits for any particular purpose.

LAWRENCE, J. The plaintiffs are not entitled to recover under the terms of the proclamation, unless they can shew that the prize was taken by a ship under the command of R. A. *Christian* at the time; without which it cannot

he said that he was *directing or assisting* in the capture, to entitle him to the flag officer's share. The question then is, whether he were entitled to share a prize taken out of the limits of his command by a ship which had been under the command of the flag officer at the *Cape*, and by him dispatched out of those limits upon a particular service within the limits of another commander? If there be nothing in the terms of his commission to entitle him, we can look only to the king's proclamation: in construing which I think we must consider that the command of the flag officer at the *Cape* was suspended during the time that the capturing ship was out of his limits and within the limits of another command. Suppose R. A. *Christian* had sent orders to Captain *Linzee* to return to the *Cape*, and that R. A. *Rainier*, within whose limits Captain *Linzee* was at the time of the capture, had ordered him to remain there; whose order was he to obey? The case shews that while within those limits he received his orders from R. A. *Rainier*, and paid obedience to them. Whether the latter acted properly in employing Captain *Linzee* in any other service than that which he was sent within those limits to perform is another question, with which we have no concern.

LE BLANC, J. I think R. A. *Christian* is not entitled to the flag officer's share, because the prize was not taken by a ship under his command at the time. When Captain *Linzee's* ship went within the limits of R. A. *Rainier's* command, she was bound to take her orders from him, and she did so. For he ordered her to take under her convoy the homeward bound *Indiamen*, and she was performing this service when she was driven by stress of weather from the other ships, and compelled to bear away for *Prince of Wales's Island*, where she took the prize. The case must therefore be taken as if she had taken the prize while convoying those ships: for it happened when she was only separated from them by accident.

Postea to the Defendant.

Hayton and Another, Assignees of Fairless, a Bankrupt, v. Jackson and Another.

8 East, 511. June 9, 1807.

The stat. 34 G. 3. c. 68. s. 15, reciting that by the laws in force, upon any alteration of property in any vessel in the same port to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such endorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering officer, or otherwise the sale shall be utterly null and void: and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then s. 16, provides that if any vessel shall be at sea, or absent from the port to which she belongs, when such alteration in the property shall be made; so that an indorsement on the certificate cannot be made; (assuming that the certificate is always with the ship;) then it substitutes a bill of sale to be made in lieu of the indorsement on the certificate; requiring the same delivery of a copy, and the same entries and notice thereof, as were required for the indorsement of the certificate by the prior section; but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made as before required. Held that the provisions of the two sections comprehend every transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was in the port of *London*, was void for want of complying with the requisites of one or other of those sections; neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21, which requires a register *de novo* upon any transfer of property to another port, and that the former certificate shall be delivered up to be cancelled.

IN trover for the ship *Mary*, which was tried at the Sittings at *Guildhall* before the Lord Chief Justice, a verdict was taken for the plaintiffs for the

value of the ship, subject to the opinion of this Court on the following case. Previous to and at the time of the execution of the instrument annexed, (a) dated the 31st of August 1805, *Fairless*, the bankrupt, who resided at *Bishop Wearmouth* in the county of *Durham*, was the sole registered owner of the ship *Mary*, then belonging to the port of *Sunderland*, where she was duly registered; and he, being then indebted to the defendants, residing in *London*, in 700*l.*, agreed to sell, and they agreed to purchase the said ship, then in the port of *London*, for 1200*l.*; and Mr. *Gray*, a solicitor at *Stockton*, was appointed by *Fairless* to prepare a proper transfer of the ship to the defendants. *Gray* accordingly prepared the said instrument, and also a copy thereof, and the form of the indorsement as aftermentioned to be made on the register, and sent them to *Fairless*, with instructions for executing the instrument, and delivering the copy to the collector of the customs of *Sunderland*. The defendants, on the 31st of August, paid to *Fairless* 500*l.*, and he executed the said instrument, but did not then deliver, nor has at any time since delivered the said copy to the said collector. On the 29th of August 1805, the ship arrived at the port of *London*; and on the 30th, her original register, pursuant to directions given by *Fairless* to the captain, was delivered by him to the defendants in *London*; who took possession of the ship, and converted her to their own use; and sent the original register to *Fairless*, who made the following indorsement thereon: "Be it remembered, That I, *M. Fairless of Bishop Wearmouth, &c.* have this day sold and transferred all my right, share, or interest in the ship *Mary*, mentioned in the within certificate of registry, to *J. and W. Jackson of London*, merchants. "Witness my hand, this 31st of August 1805. Signed in the presence of." *Fairless* duly executed that indorsement in the presence of two witnesses, and transmitted it to the defendants: but did not then deliver, nor has at any time since delivered the said copy to the said collector. On the 9th of September 1805, the bill of sale executed by *Fairless*, and the original certificate of registry granted to him, and which purported on the face of it to be of the ship *Mary*, belonging to the port of *Sunderland*, with the said indorsement thereon, were exhibited by the defendants to the collector and comptroller of customs in *London*; and the said certificate was delivered up to the commissioners, and cancelled, and registry *de novo* obtained, and a certificate thereof granted, purporting to be of the ship *Mary of London*, and taking notice that the said certificate granted at *Sunderland* had been cancelled. The defendants have since employed the ship as a ship belonging to the port of *London*. On the 11th of September 1805, the collector of the customs at *Sunderland* received the following letter, signed by the collector of the customs at *London*. "Sir, The certificate of registry granted at your port the 16th of July 1803 for the ship *Mary*, *R. S.* master, was this day delivered up and cancelled, and the said vessel registered *de novo* at this port, 9th Sept. 1805. Yours, &c. *W. Reade*, *S. C.* Custom-house, *London*." In consequence whereof, on the said 11th of September, the collector of *Sunderland* caused the following memorandum to be indorsed on the oath, upon which the original certificate of registry was obtained, and also to be entered

(a) This was an indenture, made on the 31st of August 1805, between *Fairless*, therein described as of *Bishop Wearmouth* in the county of *Durham*, and the defendants, described as merchants of *London*; whereby, after reciting that *Fairless* was the sole owner of the ship *Mary* intended to be thereby assigned, and that by a certificate of registry under the hands and seals of the proper officers of the customs of the port of *Sunderland*, dated the 15th of July 1803, it appeared that the ship had been duly registered at that port; which certificate was as follows; (setting it out in words and figures according to the usual form, and in which the ship is described as the *Mary of Sunderland*, and is stated to have been duly registered at that port:) and reciting also that the defendants had contracted with *Fairless* for the purchase of the ship for 1200*l.*: it was witnessed that in pursuance of such agreement and in consideration of that sum, *Fairless* sold and assigned to the defendants "the said ship *Mary*, now on a voyage from the port of *Sunderland* to the port of *London*, &c."

in the book of registry there. "Registered *de novo* at the port of *London* 9th *September* 1805." The said oath, with the said indorsement thereon, and the book of registry, are public documents to which any person may have access on applying for that purpose. On the 29th of *September* 1805, *Fairless* committed an act of bankruptcy; upon which a commission was afterwards issued against him, and he was duly declared a bankrupt: and the plaintiffs are his assignees, under an assignment made the 21st of *November* 1805. A copy of the indorsement so made on the original certificate of registry was not at the time *Fairless* became a bankrupt, nor has since, been delivered to the persons authorized to make registry and grant certificates of registry in the port of *Sunderland*, nor any entry thereof indorsed on the oath or affidavit on which the original certificate was obtained, nor any notice thereof given to the commissioners of the customs, nor any memorandum of the same made in the book of registry at the port of *Sunderland*, nor any copy of such bill of sale delivered to the persons authorized to make registry and grant certificate of registry, nor any entry thereof indorsed on the said oath or affidavit, nor any notice of the same given to the commissioners of the customs, otherwise than as before mentioned. The question for the opinion of the Court, was, Whether the plaintiffs were entitled to recover in this action? If they were the verdict was to stand; if not, a verdict was to be entered for the defendants.

Holroyd, for the plaintiffs, said, that whether the ship were to be considered at the time of the transfer, as a ship in the same port to which she belonged, within the 15th section, or as a ship absent from such port, within the 16th section of the stat. 34 Geo. 3. c. 68; in neither case had the requisites of the statute been complied with: for neither a copy of the indorsement upon the original certificate of registry had been delivered to the person authorized to make registry and grant certificates of registry in the port of *Sunderland*; which is required by the 15th section to be done by the party to the transfer; without which the sale is declared to be utterly null and void: nor was a copy of the bill of sale so delivered, nor any entry thereof, indorsed on the oath or affidavit; nor any notice of the same given to the commissioners of the customs, as is directed by the 16th section, in case of the transfer of a ship absent from the port to which she belongs. To this purpose the case of *Blaxham v. Hubbard*, 5 East, 407, is directly in point. He afterwards argued that this was to be considered as a ship absent from the port to which she belonged, at the time of the transfer; and therefore that the requisites of the 16th section should have been complied with. The assignment itself considers her as a ship at sea, though she were in fact in the port of *London* at the time of the transfer. But the port to which a ship belongs is ascertained by stat. 26 G. 3. c. 60. s. 5, to be that "from and to which she shall usually trade; or, being a new ship, shall intend to trade; and at or near which the husband or acting owner usually resides." There is nothing inconsistent with this provision in the stat. 7 & 8 W. 3. c. 22. s. 21; which directs that there shall be a registry *de novo* upon any transfer of property in a ship to another port: because that only applies to what is to be done in the port to which the ship is so transferred. But the latter statute directs certain other things to be done in the port from whence the transfer is made; which must either be taken to superinduce other things to be done in addition to what was required by the statute of William, or to supersede the latter altogether. The object of the Legislature was to enable the property in *British* vessels to be easily traced by public documents; which cannot be done unless some memorial of the transfer of a ship from one port to another remains upon the registry of the port to which she originally belonged. They therefore meant to comprehend every possible case of transfer within the descriptions of the 15th and 16th sections of the stat. 34 G. 3. c. 68, as of a ship either in or out of the port to which she belonged at the time of the transfer; and the provisions of those

two sections are adapted accordingly, upon the supposition that the certificate of registry is always kept on board the ship, as it ought properly to be. Therefore where the ship is in the port to which she belongs, the transfer of property is to be made by indorsement on the certificate of registry; a copy of which is to be delivered to the proper officer of that port to enable him to make the necessary entries on the original affidavit and in the book of registry kept as public documents in the same port, and to give notice thereof to the commissioners of the customs. On the other hand, where a transfer is made of a ship *absent from* her port; so that, in the language of the 16th section, an indorsement on *the*(a) certificate cannot be immediately made, (the certificate of registry being supposed to be absent with the ship,) the copy of the bill of sale is to be delivered to the same officer who is to make the same entries thereof, and give the same notice, as he was required to do of the indorsement on the certificate in the former case. But according to the construction contended for by the defendants, if the ship were absent from her port at the time of the transfer, but had left her certificate of registry on shore, it would not be necessary to comply with the requisites either of the 15th or 16th sections, as not being a case within either; which would be a manifest absurdity.

Richardson, for the defendants, rested their title upon the stat. 7 & 8 W. 3. c. 22. s. 21, which provides for the case of a transfer of property in a ship (*i. e.* of the whole ship) to another port, by requiring a registry *de novo* of her in the port to which she is so transferred, and a delivery up of the former certificate to be cancelled; both which were done in this case on the sale of the ship to the defendants, who were merchants residing at the port of *London*. The same clause of the act provides for the case of a partial alteration of the property in the same port, by the sale of one or more shares only; which sale is required to be acknowledged by indorsement on the certificate of registry before two witnesses. The former part of the provision remains unaltered by any of the subsequent statutes. But the stat. 26 Geo. 3. c. 60. s. 16, reciting in the very words of the latter branch of the statute of William, that the provisions made in the said act, "touching the indorsement on certificates of registry in case of any alteration of the property in any ship in the same port to which she belongs," had been found insufficient; for remedy enacts, that in every such case, *besides the indorsement* required by the said act, there shall also be indorsed on the certificate certain other things there mentioned: and that the vendee shall also deliver a copy of such indorsement to the registering officer, who is to indorse an entry thereof on the original affidavit on which the original certificate was obtained, and also to make a memorandum of the same in the book of registry, and give notice of it to the commissioners of the customs. Then the stat. 34 Geo. 3. c. 68. s. 15. & 16, refers to the same branch of the statute of William which was the object of the stat. 26 Geo. 3, namely, "an alteration of property in any ship in the same port to which she belongs," on which s. 15 recites that by the laws now in force "an indorsement is required to be made;" and then it enacts that *such indorsement* shall be made in the manner therein prescribed. And then the 16th section comes by way of *proviso*, "that if any ship shall be at sea or absent from the port to which she belongs at the time when *such alteration* of the property shall be made as aforesaid, so that an indorsement on the certificate cannot be immediately made," then something else is to be done. Still this refers to cases where an alteration in the property is to be made in the same port, and where this is to be notified by indorsement on the certificate of registry: but no such indorsement is required by any statute to be made where the whole property is transferred to another port: which is the case provided for by the first branch

(a) By mistake in the printed act it runs thus, "so that an indorsement or certificate cannot be immediately made," &c. Vide *Heath v. Hubbard*, 4 East 190.

of the statute of William, where such transfer is to be notified by delivering up the original certificate to be cancelled, and registering the ship *de novo*, as was done in this case. This construction of the 16th section of the stat. 34 G. 3, reconciles all the provisions of the several acts : and is further warranted by the very terms of that section ; which do not comprehend every absence from the port to which the ship belongs, but only an absence, *so that* no indorsement on the certificate of registry can be immediately made ; and therefore would not comprehend an absence like that which occurred in this instance, where the ship being in another port at the time of the transfer, an indorsement might still have been made on the certificate at the time of the transfer : and as little would it apply to a case where the certificate had been left on shore in the port to which the ship belonged, though the ship itself were absent. Then the object of the registration being the notoriety of the ownership of *British* vessels, the registration *de novo* at the head office in the port of *London*, whither notice is to be sent in all cases, will answer the purpose as effectually as the method insisted on by the plaintiffs. At any rate, this is distinguishable from *Bloxham v. Hubbard*, 5 East, 407 ; and from *Moss v. Charnock*, 2 East, 399 ; for in each the transfer was made while the ship was at sea and no indorsement could be made on the certificate ; and therefore the case came within the words at least of the 16th section of the stat. 34 Geo. 3. Neither is this case within the prohibition of the 4th section of the stat. 26 Geo. 3. c. 60, that no registry shall be made, or certificate thereof granted in any other port than that to which the ship properly belongs ; for after the ship was transferred to persons residing in the port of *London*, that was the port to which she properly belonged. [*Lawrence, J.* asked how the sale of the ship to persons in *London* could be said to be a transfer of the ship to that port, within the terms of the 4th section of the 26 G. 3, which describes the port to which the ship shall be said to belong, as the port “*from and to which she shall usually trade,*” or, “*being a new ship, shall intend to trade ; and at or near which the husband, &c. shall usually reside ?*”] The trading may be understood as of a concurrent act with the registry *de novo*. But if the clause will not admit of that interpretation, it is a difficulty which must apply to every case of a transfer to another port, which may be made without any change of property, by the original owner's changing his place of residence from one port to another ; which of course could not be meant to be prohibited.

Lord ELLENBOROUGH, C. J. The forms of the act of the 34 Geo. 3, required to be observed in transferring the property in a ship from one person to another, have not been complied with in this case, and therefore the property remained in the bankrupt at the time of the bankruptcy, and passed by the commissioners' assignment to the plaintiffs. All cases of transfer of property, as they affect ships in or out of the port to which they belong, are contained within the provisions of the 15th and 16th sections of that act. If the ship were in the same port at the time of the transfer, then an indorsement is required to be made in the form therein expressed : which form is as applicable to a transfer of the whole, as of aliquot shares of a ship, “*which shall be signed by the person or persons transferring the property of the said ship,*” &c. ; and a copy of such indorsement is to be delivered to the proper officer ; otherwise the sale is to be utterly null and void : and the officer is required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and also to make a memorandum of the same in the book of registry and forthwith give notice thereof to the commissioners of the customs. Then the 16th section, contemplating that the ship might be at sea or absent from her port at the time ; and contemplating the probable consequence, that her certificate of registry would be on board her, as the constant consequence ; in which event the requisition of the former clause could not be complied with : provides that, notwithstanding such absence

of the ship and of the certificate, the property may still be transferred by bill of sale; and requires that the same copy shall be delivered, and entries made and notice given, of the bill of sale, as had been before required in the case of the indorsement on the certificate; and that within ten days after the vessel shall return to the port to which she belongs the indorsement shall be made and the other requisites complied with in the manner before directed. In the present case, the indorsement on the certificate might have been made, as well as all the other requisites of the act complied with, at the time of the transfer, the ship being then in the port of *London*; but the parties have not done it: and therefore they have not done all that they might have done in compliance with the statute. But it is contended, that on this very account the case is not within the 16th section; because the ship was not at sea, nor *so* absent from the port to which she belonged, as *that* the indorsement on the certificate, could not have been immediately made: and then what is the conclusion drawn? that because the indorsement might have been then made, though the ship were absent from her port, neither that nor any other of the requisites of the act are to be complied with: construing the words *so that*, &c. as a condition; which it is not; but only a provision for a particular case, where it was considered that the indorsement required could not be made. It is sufficient to state the argument in order to answer it. If such a construction were made, it would defeat all the objects of the Legislature. But in putting the construction which I have done, I have confined myself to the fair and literal meaning of the words taken altogether, and promote the object of the Legislature which was to notify in the port to which the vessel belonged at the time, that all the requisites, which the Legislature have deemed necessary for ascertaining the ownership of *British* vessels, had been complied with, before she was transferred to any other port; in order that the title to the ship may be traced from port to port, as well as in the same port. And this agrees with the interpretation which we put upon these acts in *Blazam v. Hubbard*. Here the parties have proceeded *per saltum* to the head office to get a registration *de novo*, instead of going through the intermediate steps required by the stat. 34 Geo. 3.

GROSE, J. agreed. The object of the Legislature, in requiring the several things to be done which are mentioned in the 15th and 16th sections of the act, was to enable the public to trace from port to port to whom the property in *British* ships belonged: and those requisites not having been complied with in this instance, the property did not pass out of the bankrupt.

LAWRENCE, J. The registration *de novo* does not make any difference in the question, which is a question concerning the transfer of the property in the ship. The statute of William requires a registration *de novo* in two cases; 1. upon changing the name of a registered ship; 2. upon any transfer of the property to another port. Such a transfer may take place without any change of the property to another; the property continuing in the same owner. The object of the Legislature there was to provide for the transfer of property in a ship from one port of registry to another; but it does not direct the mode in which the transfer of property from one man to another in another port is to be made: that direction was supplied by the stat. 26 Geo. 3, and 34 Geo. 3. The latter provides for the two cases where the ship at the time of the transfer is in the port to which she belongs, and where she is absent from it: and the regulations are adopted accordingly. In the one case, where she is in port, an indorsement is required by the 15th section to be made on the certificate of registry, a copy of which is to be delivered to the proper officer, on pain of annulling the sale if either be omitted; and the officer is required to cause an entry thereof to be indorsed on the affidavit on which the original certificate of registry was obtained, and also to make a memorandum of the same in the book of registry, and give notice to the commissioners of customs. The other case contemplated was where the ship was absent from her port at

the time, when the Legislature considered that the captain would do that which he ought to do, namely, have his certificate of registry on board with him; and then by section 16th it substitutes a copy of the bill of sale in the place of the indorsement on the certificate, still preserving the other regulations: and this is to serve till within ten days after the return of the ship to her port, when the indorsement before required is to be made and the other acts to be done as before mentioned. The object of all this is that, by referring to the documents at the custom-house, persons may know to whom the property in the ship belongs at any time. But it is argued, that there is a third case, which has been omitted to be provided for; namely, where a ship is transferred to another port, while she is absent from her own, but in another port; and where her certificate of registry might be obtained for the purpose of being indorsed. But that would be a very strange construction of the act; for it would in effect be saying, that if a ship were absent from her own port, but had left her certificate of registry there, which would enable every thing to be done which was required in any case, that ship might be transferred to another owner, and continue trading from one port to another with all the privileges of a *British* ship, without complying with any of these acts, and without the public having any means of knowing in whom the property was. This would entirely defeat the object of the Legislature, and therefore unless it were plainly expressed that such was their intention, we ought not so to construe the act. Upon the whole, therefore, I think that the property in the ship was not properly transferred by the bankrupt to the defendants, and consequently that the assignees are entitled to recover.

LE BLANC, J. This is a case where the ship, at the time of the execution of the bill of sale by the bankrupt, was out of her own port of *Sunderland*, and in the port of *London*, where the vendees resided; and the question is, Whether the property of a ship so circumstanced can be transferred to purchasers residing at another port, without complying with the requisites either of the 15th or 16th section of the stat. 34 Geo. 3. c. 68. The provisions of the two sections were intended to embrace every case of the transfer of property in a ship. Section 15th extends to any alteration of property in the ship in the same port to which she belongs: and section 16th extends to every case where the ship, at the time when such alteration shall be made, is at sea or absent from the port to which she belongs; so that the thing required by the former section, namely, the indorsement on the certificate of registry, which is presumed to be always with the ship, cannot immediately be made; which is the manner of making the transfer when she is in port. Therefore, taking the two sections together, it is very clear what was meant by the Legislature. But it is said, that the indorsement on the certificate might have been made in this case, though the ship were absent from the port to which she belonged: and therefore, not being so absent from her port as that the indorsement could not be made, it is not a case within the 16th section. But if she were not so absent, &c. as to bring her within the 16th section, then the requisites of the 15th section ought to have been complied with: therefore, either way, the property was not conveyed out of the bankrupt in the manner required by the act of the 34th of the king.

Postea to the plaintiffs.

The King v. The Sheriff of Middlesex, in the Cause of Potter v. Marsden.

8 East, 525. June 11, 1807.

The sheriff cannot be ruled to bring in the body until the time for putting in bail has expired.

THE process by original was returnable the 3d of *May* last, and the sheriff

was ruled to return the writ; which rule expired on the 8th: and the writ not being then returned, the rule to bring in the body was taken out on the 9th, served on the sheriff on the 11th, and expired on the 13th. The *quarto die post* was the 10th of May, which being on a Sunday, the party had time to put in bail till the 11th; on which day bail was put in, and exception was taken to them on the 12th; and they not justifying on the first day of term, an attachment was moved for against the sheriff on the next day for not bringing in the body. *Lawes* thereupon obtained a rule for setting aside the attachment, contending that until the sheriff made default, which he could not be said to do till after the time allowed for putting in bail, he could not be ruled to bring in the body: and cited *Rex v. The Sheriff of Middlesex*, 8 Term Rep. 268. *Espinasse*, who shewed cause against the rule, contended that the rule to bring in the body and the rule for putting in bail might be concurrent, though the sheriff could not be attached if the bail were put in and justified in time: and here, having been excepted to and not having justified, they were as no bail. All that was required in *Hutchins v. Hird*, 5 Term Rep. 479, was, that the sheriff should not be ruled to bring in the body until the day after the expiration of the rule to return the writ; which was complied with in this case.

The Court, however, after consulting the Master, said, that the sheriff could not be ruled to bring in the body until the time for putting in bail was expired.

Rule absolute.

Mathews v. Gibson.

8 East, 527. June 12, 1807.

Upon the defendant's coming in to reverse an outlawry in a civil case, upon the stat. 4 & 5 W. & M. c. 18, the usual form for taking the recognizance of bail is to pay the condemnation money; and not in the alternative to pay it or render the defendant.

CURWOOD moved for a rule to shew cause why the outlawry in this case should not be reversed, and why the plaintiff or his attorney should not pay the costs of the reversal: upon an affidavit that the place of residence of the defendant was well known at the time to the plaintiff and his attorney, and that he was amenable to the process. And the only question was, whether (this being a bailable action,) the bail should enter into a recognizance, in the alternative, to render the defendant, or pay the condemnation money; or singly to pay the condemnation money; in which latter form the master required them to enter into the recognizance. But this, he said, was only required by the st. 31 Eliz. c. 3. s. 3, where the outlawry is reversed for want of proclamations; and that in all other cases, in civil actions, the recognizance of bail ought to be taken upon the statute 4 and 5 W. and M. c. 11, in the alternative, to render the body, or pay the condemnation money; as in ordinary cases of appearance to the process. And he referred to *Serecold v. Hampson*, 2 Stra. 1187.(1)

LAWRENCE, J. however mentioned *Berwick v. Parkin*, E. 31 G. 3, and *Phillips v. Warburton*, Mich. Term 1785(a): by which it appeared that though the practice formerly was to take the recognizance of bail in the alternative, yet that now it was settled to be taken, to pay the condemnation money only. And *the Court*, after consulting with the master, said that there were other cases, besides those which Mr. Justice *Lawrence* had mentioned, where the recognizance had been directed to be taken in this, which was now the usual form: and therefore they directed it to be so taken in this instance;

(1) See a more full note of the same case taken from Short's MS. in 12 East, 625.

(a) Impey's Practice, 611. (7th edition.)

saying however, that if, in the result, any reason should be shewn to them for giving indulgence to the bail, they should consider it.(1)

The King v. Brown.

8 East, 528. June 13, 1807.

Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman, who rented under him his stock of cows to be depastured on the same land, was not rated for such dairy; although it were stated in the case, that the dairyman made a profit of the produce of the cows, independent of the profit made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement; yet that is in respect of the interest in the land: and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to it: or considering the cows as personal stock, distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labour out of the capital stock of another.

The occupier of a clay pit is rateable for the same.

THOMAS BROWN appealed to the sessions against a rate made for the relief of the poor of the parish of *Church Knowle*, in the county of *Dorset*; as being illegal, unequal, partial, and defective; 1st, because the appellant *Brown* was therein assessed in respect of *clay pits*, for which he was not liable to be rated at all: 2dly, because *W. Pike* was also therein rated for clay pits: 3dly, because *Thomas Langford* and four other persons, (naming them,) were omitted to be rated for and in respect of a dairy of cows and the pasturage of lands in his and their respective occupations: although the said dairies and pasturages were situated, rented, occupied, and enjoyed within the said parish; and although the same, or the occupiers thereof, in respect of the profits derived therefrom, were respectively rateable. Other omissions were also stated, upon which no questions arose. On the trial of the appeal the following facts appeared. That in the parish of *Church Knowle* there are strata of potter's clay which have been opened for more than a century, and potter's clay dug and exported from thence for the supply of different potteries. The clay is found at a considerable depth under the surface of the ground. The clay pits in some instances are occupied and worked by the owners of the land: in other instances they are demised distinctly from the land, and worked by the lessees at annual rents paid to the lessors. In neither of these instances have the clay pits ever hitherto been rated; but the lands in which they lie have been, and are rated according to their annual value, independent of the clay pits. These clay pits, in which several labourers are constantly employed, are worked at a great expence, and the profits are fluctuating, but always considerable. That in the same parish the occupiers of several farms, who are rated to the poor for their respective farms, let their cows to an undertenant, called a dairyman, at a certain rent per cow; which cows, by the agreement, are exclusively depastured on different grounds belonging to the occupier of the farm, at different times of the year; he being obliged to feed and maintain them without any expence to the dairyman. That the dairyman makes a profit of the milk and produce of such cows, independently of the profit made by the tenant of the farm. On these facts the sessions were of opinion, that the clay pits were rateable; and that the dairies were not rateable: and therefore confirmed the rate: subject to the opinion of this Court on the case stated.

On the argument of the case, it was admitted in the first instance, that the

(1) But where a reversal of outlawry in a civil action is sought for a common law error, the recognizance of bail is to be taken in the alternative. *Havelock v. Geddes*, 12 East, 622.

defendant was rateable for his clay pits, upon the same principle that a slate work was holden rateable in *The King v. Woodland*, 2 East, 164; and a lime work in *Rez v. Alberbury*, 1 East, 534. Upon the other point, as to the dairymen;

Burrough and *Wollaston*, in support of the order of sessions, contended that to rate the dairymen, in respect of the profit which they make of the milk of the cows, is in effect to rate the profits of the land twice; once in the hands of the farmer or occupier of the land, in respect of the value of his farm; and a second time in the hands of the dairyman, in respect of the profit of the stock on the farm; the value derived from which stock constitutes the principal part of the value of the farm itself, and without which the profit of the farmer would be greatly diminished. It is impossible to distinguish the value of the cows from that of the farm itself, on which they depend for their subsistence; upon a dairy farm the profit of the land is derived through the medium of the cows. If the farmer had kept the dairy in his own hands, it is clear that he could not have been rated for that and his land also; for it has been holden that he is not taxable to the poor rate for his stock. *The Queen v. Barking*, 2 Ld. Ray. 1280. But where is the difference if the farmer, instead of selling every pail full of milk as it comes from the cows, make a general agreement with the dairyman for the sale of the whole milking at a certain rate? It is merely a mode by which the farmer receives the profit of his farm. Great inconvenience would ensue if the different parts or sources of profit of a farm were to be rated separately: the farmer might make a similar agreement with the butcher, or with a shepherd, &c., until every particular source of profit of the farm was exhausted: and then it would follow from what is now contended for, that these several contractors, and not the farmer himself, should be rated for the profits of the farm: but the rule of rating which has prevailed is more convenient.

The Attorney General, Pell, and *Moysey*, contra, said that after it had been decided, that the taking of such an interest as the dairyman had in the land in this case was in law a taking of a tenement,^(a) so as to enable the occupier to gain a settlement by it; and that any interest in land was rateable; and that personal property producing profit in the parish was also rateable: and the dairyman being found by the case to be in possession of such an interest in the land, and in personal property so productive; it was difficult to say that he was not rateable at all: there being no question now as to the quantum of the rate, or whether the farmer may not have been overrated in respect of the separate profits of his farm. But supposing the dairyman to have been properly omitted to be rated, in respect of his interest in the land; or at least that the appellant could not complain of such omission where another person was rated for the whole farm; still the dairyman ought to have been rated for the distinct profit which he is stated in the case to have made of the cows, independently of the profit made by the tenant of the farm; to which the objection of a double rating does not apply, as in *Rowls v. Gell*, Cowp. 451, and *Lord Bute v. Grindall*, 2 H. Blac. 266. This at least constituted part of his personal ability, in respect of which he was rateable. If the land produce a double profit to different persons, in respect of their different interests in it, there is no reason why each should not be rated for his own interest. And though it be said in *The Queen v. Barking*, that a farmer is not rateable for the stock on his farm; yet in the report of the same case in 16 Vin. Abr. 426. pl. 6, it is said, that if he have a superabundant stock, more than the land require, he shall be taxed for that: and this is the same thing, where an extra profit is made of the stock by another person. The poor's rate is not a charge upon the land or upon personal stock, but upon the person, in respect of his profit from either.

(a) *Rez v. Piddletrentkide*, 3 Term Rep. 772, and *Rez v. Tolpuddle*, 4 Term Rep. 671.
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LORD ELLENBOROUGH, C. J. The appellant complains of the rate, without shewing any grievance; because the farmer having been rated, as we must presume, for the full profits of the farm, it matters not to the appellant whether or not the rate in respect of that farm could have been better distributed by laying one portion of it on the farmer, and another portion on the dairyman: the appellant's proportion of the rate would remain the same in either case. It is said, that the interest which the dairyman takes under such an agreement is a tenement in law, and gives him an interest in the land, by which he may gain a settlement: and that I do not dispute: and therefore if the dairyman, considering him, and not the farmer, as the occupier of so much of the farm as the cows were depastured upon, had been rated as such for it, I do not see what objection could have been made. But here the objection is, that the farmer is rated for the whole farm, the profits of which arise principally from the stock upon it; and a part of those profits are again required to be subjected to another rate in the hands of the dairyman. But there is no objection to the rate as it now stands; and great inconvenience would ensue if the profits of different persons out of the same farm were subdivided, and a proportionable rate laid upon each, instead of one general rate for the whole on the general occupier of the whole. A farmer may bargain with one man to let him have a field of grass to cut, or he may let the aftermath of his meadows, some to one and some to another; and this may not only vary every year, but every month or oftener in the neighbourhood of populous towns. These are substantially the tenants of the land while their subordinate interests subsist, and either might be rated for it during such holding; but if there be one general rate made on the general occupier of the whole farm, including all these particular profits and subdivisions of interests, by which in fact he is benefited, who can say that he is injured by the rating of one for the whole, rather than the several sub-tenants of those partial interests for their respective proportions, deducting the value of them from the rate upon the general occupier? And as to the convenience of the general rate for the whole, there can be no question of it. Other cases may be put; the owner of a house and garden may let the profits of his garden to his gardener, retaining the use of it in other respects, upon condition of the latter supplying his table with certain articles, or upon a rent; and though the gardener might be rated for this interest, yet if the owner were rated for his house and garden, what objection could any other person make to the rate on that account? The principle is, that the estate which has once paid shall not be made to pay again: and yet in all these cases it may be truly said that some profit is made by the sub-holder, beyond what the general occupier receives. What was said by Lord Mansfield in *Lord Bute v. Grindall*, 1 Term Rep. 338, and 2 H. Blac. 265, does not contradict this; that where there was a proportion of the profits of the land rateable in the hands of the tenant, which was not rateable in the hands of the crown, the tenant was assessable for it. But here the whole having been rated in the hands of the farmer, nothing remains to be assessed in the hands of the under-tenant. It would be a different question if a farmer derived profit from stock kept on his farm but not connected with the management of it; as if he kept a large stock of cattle there, which he fed with oil cake for sale: there he would be separately rateable for it, not as stock of his farm, but as stock generally, from which he derived a separate and distinct profit. But here the dairy cows are, properly speaking, the stock of the farm. And as to any separate profit derived from them to the dairyman distinct from the farmer, the same might be said of a man to whom the farmer sold the milk by pails full on the premises, and who, after mixing it with water, retailed it again at a profit.

GROSE, J. The question is whether the appellant has any ground of complaint. He complains of being rated too much, because certain persons renting dairies in the parish have been omitted in the rate. But it appears that

though those persons be not rated, others are so, for the same subject matter; because the profits derived from the stock of cows on the farm have in effect been once rated; being included in the rate upon the farmer for the profits of the whole farm of which they constitute part.

LAWRENCE, J. It is contended that the dairymen are liable to be rated for their dairies on two grounds; 1st, That a dairy is a tenement, the taking and occupying of which is capable of conferring a settlement, and that every occupier of a tenement is liable to be rated in respect of it. That may be so: but the ground of appeal is, that the appellant is injured by the omission of these persons in the rate. But if it appear that others are rated for the whole value of the farms, including the profits of the cows depastured on them; and that the appellant sustains no injury in any way, the ground of appeal fails. Then, secondly, it is said, that the cows are personal property, and that the dairymen are liable to be rated for the profits made by such stock. But this is the stock by which the farm is rendered productive, and having been once taxed in effect, in respect of the produce, in the hands of the farmer, is the produce to be rated again, as milk, in the hands of the dairyman? By the same rule might it not be rated again as butter, and again as cheese, in the hands of the same person, on account of the additional profit which may be made of it in each of these stages? This would be carrying the principle of rating much further than it has gone before. It would be very inconvenient to parishes to subdivide the rate in the manner proposed. If a person taking the aftermath of a meadow is to be rated for it, instead of including it in the rate for the whole farm, what is to be done when this is taken, as it frequently is, by drovers of cattle passing along the road, who depart again in a few days, and are no where to be heard of. Experiments of this sort, if carried into effect, would only introduce confusion: the amount of the rate would be the same: for if by underletting the aftermath the original renter make more of the land, he is rateable in proportion: and it will be found much more advantageous to the parishioners at large to abide by the old practice, and to lay one entire rate on the whole farm in the hands of the general occupiers.

LE BLANC, J. I am surprized that the sessions should have reserved any case upon the application of this appellant, when the only question was, whether, with respect to him, this were an equal rate, or whether injustice had been done to him by the omission of the dairymen in the rate. For supposing it to be a question whether the farmer or the dairyman were in possession of the property to be rated, and that it were a case of doubtful occupation; yet when it appears that one of them has been assessed for the whole property, and that neither of them complained of the rate, what pretence can there be for setting aside or altering the rate, at the instance of a third person, who has no interest in that question, in order to decide a question of doubtful possession between the other two. Taking it, however, as a case between the farmer and the dairyman; it is true that the taking of a dairy in this manner has been held to give a settlement, as upon the taking of a tenement: but it has only been held to be a tenement, in respect of the interest in the land on which the cows are agreed to be depastured. But here the farmer has the general interest in the whole land, out of which the other interest is carved: the cows fed upon it are his own: they are his stock: the dairyman is to have the care of them, and the trouble of milking them, and the profits arising from the produce of the cows, in consideration of a certain sum which he agrees to give the farmer. Then what is this in effect more than the farmer making this profit of his land and of his stock by this general agreement with the dairyman, instead of employing his own dairyman to milk the cows, and afterwards disposing of the produce when made into butter or cheese? It is a mode of selling the milk of his cows. Then it is said that the dairyman is rateable as for his personal stock: but he is not the owner of the cows; they are

not his personal stock; he has no capital of his own; but he only makes a profit by his personal labour out of the capital of another person.

Rate confirmed.

The King v. The Inhabitants of Sherborne.

8 East, 537. June 13, 1807.

Silk throwsters working up in their mills the silk of their employers sent to them for that purpose are not liable to be rated in that respect, as for their stock in trade.

IN a rate made for the relief of the poor of the parish of *Sherborne*, in *Dorsetshire*, *W. Burnet* and *J. Andrews* were rated for *stock*, meaning *stock in trade*; against which rate they appealed to the sessions, on the ground that they were not possessed of any stock in trade rateable within that parish: and at the hearing of the appeal, the following facts appeared. That the appellants were rated for their *stock*. That it had been usual to rate persons for their personal estate within the parish. That the appellants are silk throwsters, and in possession of certain buildings and mills in *Sherborne*, in which the business of cleaning, spinning, and throwing silk is carried on by persons employed by them. That the appellants are in the course of receiving from their employers in *London* raw silk in packages, which they clean, spin, and throw, in different ways, according to the directions they receive. That when it has gone through such process in their mills, they return the same silk in its improved state to their employers; charging a certain sum to them for every pound so returned, by which they make a profit after paying the wages of their workmen and other expences attending the manufacture. That they have always some silk of this description in their possession. That the said silk is never exposed to sale by them, nor is longer in their possession than is necessary to give them time to clean, spin, and throw the same according to the directions they receive. The sessions were of opinion that the appellants were not rateable for *stock*, and therefore amended the rate by striking out their names; subject to the opinion of this Court on these facts.

The Court, upon hearing the case read, said that it was impossible to call the silk the stock in trade of the appellants, who were employed to work it up. It was nothing like stock, in the sense in which it had always been understood, as the subject of rating.

Burrough and *Moysey*, who were to have contended for the rateability of the appellants in this respect, admitted that they could not support the proposition in this shape. And *The Attorney-General* and *Wollaston*, contra, said that a blacksmith might as well be rated for a horse which was sent to him to be shod.

Order of Sessions confirmed.(a)

The King v. The Inhabitants of Erith.

8 East, 539. June 15, 1807.

Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child is not admissible to prove the birth settlement of such child.

ON appeal to the Sessions from an order of Justices, removing *William Harris*, his wife, and children, by name, from the parish of *Cranbrooke* to the parish of *Erith*, both in the county of *Kent*, the order was confirmed, subject to the opinion of this Court on the following case.

(a) *Vi. Rex v. Dursley*, 6 Term Rep. 53.

The respondents, in support of their case, examined the pauper, *W. Harris*; who stated, that about 20 years ago, being then about 14 years old, he remembered being at *Erith* with his father from the month of *June* to the *Michaelmas* following. That they lived in a barn, having no fixed residence, but travelling the country from place to place. That he remembered being at other places before this sojourning at *Erith*. And that his father, who was now dead, had told him that he (the pauper) was born a bastard at *Erith*, and had pointed to that place as they were passing; telling him that that was the place of his (the pauper's) birth. The pauper further stated that he followed the same wandering life that his father had done, and never resided permanently in any place, and had done no act to gain a settlement. The respondents also proved a search made in the books of the parish of *Erith*, and that no register of the pauper's baptism was to be found there. There was no other evidence; and the Sessions, being of opinion that this was sufficient evidence of the pauper's birth in *Erith*, confirmed the order, subject to the opinion of this Court, Whether upon the facts above stated, such evidence were admissible to prove the pauper's settlement in the parish of *Erith*?

Taddy and *Andrews*, in support of the order. The declaration of the parent is evidence of the birth of a child: it is evidence of the *time* of the birth, *Herbert v. Tuckal*, T. Ray. 84, so as to fix the age of the child; or to prove it born before marriage, *Goodright v. Moss*, Cowp. 591; then why not also evidence of the *place*? On a question of title in ejectment, it might be material to know whether a child were born abroad out of the king's dominions; as if alienage were set up as a defence: and would not the declaration of the parent be evidence of that fact? It stands upon the same reason as his declaration of the fact of the birth: it is the best evidence the nature of the thing will in general admit of. For who can speak as to the place of birth except those who were present at the time, and who have had the means of continuing their knowledge of the identity of the person as he grew up from infancy. This must always be best known to the parents, and probably to none others. Declarations of persons are in no instance received except as made by those who have peculiar means of information on the subject on which they speak; and no bias to distort the truth: which strongly applies to the present case, where the father could have had no interest in making this declaration as to the place of his son's birth. In *Rez v. Eriswell*, 3 Term Rep. 707, on which the Court were divided, the attempt was to make the declaration of the parent evidence not merely of the fact, but of the law.

Pitcairn and *Berens*, contra. There is no public convenience or policy in encouraging orders of removal, and therefore there is no reason why the strict rule of evidence should not be applied to this case. Since the argument of *The King v. Eriswell* it has been decided^(a) that hearsay declarations of the parents as to the settlement of their children are not evidence. By the general rule all evidence must be given upon oath, where the adverse party has the option of cross examining the witness. The only established exceptions where hearsay evidence is admitted are in cases of prescription, custom, and pedigree; and these are founded upon necessity; for if reputation in respect of the two first, and the declarations of the family as to the other, were not admitted, all probable evidence of those facts would be excluded. But as reputation is no evidence of a particular fact, so neither can any particular or collateral fact on a question of pedigree, such as the *place* of birth of a child, be proved by the hearsay declaration of the family; for this goes beyond the exception which has been established; which is merely as to tracing the descent. And where Mr. Justice *Buller*, Bull. N. P. 294, 5, mentions hearsay evidence of the family to prove a relation *beyond the sea* dead; that must be understood merely as

(a) *Rez v. Nuneham Courtney*, 1 East, 373. *Rez v. Chadderton*, 2 East, 27. *Rez v. Ferry Frystone*, ib. 54, and *Rez v. Abergwilly*, ib. 63.

evidence of the death of the person, and not of the fact that he was beyond the sea at the time.

The Court, considering that the decision of this case might affect the general question of hearsay declarations of the family in cases of pedigree, (though they thought this case went further than any of those,) directed the matter to stand over for some days; when

Lord ELLENBOROUGH, C. J. delivered their opinion.

This was a case in which the question was, Whether the hearsay declaration of the father of a bastard child, as to the place of his, the bastard's, birth, were competent evidence of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of *pedigree*. The controversy was not as in a case of pedigree from what parents the child has derived its birth; but in what *place* an undisputed birth, derived from known and acknowledged parents, has happened. The point thus stated turns on a single fact involving no question but of locality; and therefore not falling within the principle of, or governed by the rules applicable to, cases of pedigree; and is to be proved therefore, as other facts generally are proved, according to the ordinary course of the common law: that is by evidence to which the objection of *hearsay* does not apply. Upon this short ground therefore, without further adverting to the several points made in argument, we are of opinion that evidence of the father's declaration as to the birth-place of the pauper, the bastard, ought not to have been received; and of course that the rule, *nisi* for quashing the order of Sessions must be made absolute. (1)

The King v. James Theodorick.

8 East, 543. June 15, 1807.

- . Where the *whole corporation* are summoned for a particular purpose, (*e. g.* to receive the resignation of a common councilman) a *select body*, who are *all present and consenting*, may, at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common councilman in the place of the other resigned; the power of election being in such select body, and the *charter* not requiring any previous summons

LORD ELLENBOROUGH, C. J. delivered the judgment of the Court in this case, which had stood over for consideration.

This was a rule to shew cause why an information in nature of *quo warranto* should not be granted against the defendant, for usurping the office of one of the common councilmen of the borough of *Thetford*. The defendant had been elected to fill a vacancy in the common council, made by the resignation of one *John Theodorick*. The right of election to vacancies in the common council, under the charter, is in the mayor, recorder, (or deputy recorder,) and the coroner. The election of the defendant was made by the mayor, recorder, and coroner, *unanimously*, on the day on which *John Theodorick* had resigned, and after such resignation had been accepted at a meeting of the body at large, duly assembled, on summons, for the purpose of accepting such resignation: but (as appears to us on the affidavits) there had been no previous summons of the select body, viz. of the mayor, recorder, and coroner, for the purpose of electing a successor in the common council to the person whose resignation had been so accepted: but all of them being met, as a part of the body at large, for the purpose of accepting the resignation above-mentioned, they afterwards continued together, and unanimously agreed to proceed to fill up the vacancy in the common council made by such resignation; and accord-

(1) Vide *Bartlet v. Delprat and al.* 4 Mass. Rep. 702, where most of the authorities relating to hearsay evidence are referred to.

ingly elected the defendant. It has been argued in support of the rule, that this election was invalid, for want of a previous special summons to the electors for the purpose of this election. And indeed, if a summons of any kind had been specially required by the charter, a compliance therewith would have been strictly necessary in order to have rendered the election valid. But as the charter is silent on this head, previous summons is only necessary for the purpose of preventing an election from taking place by surprise, *i. e.*, by some of the electors, without due means of attendance upon that occasion being equally afforded to all the others. But due and equal means of attendance cannot be said to have been wanting, for any effective purpose, when all the electors have been actually present, and have, without objection on the part of any one of them, consented to proceed, and have in fact proceeded, to an election, and have unanimously concurred in the object of such election; as was the case in the present instance. The case of *The King v. The Mayor, &c. of Carlisle* (1 Str. 385,) was strongly urged in support of the rule. The question there arose upon a return to a mandamus to restore one *Poulter* (his name in the record is *Coultherd*,) a capital citizen of *Carlisle*, who had been removed by the mayor and aldermen, in whom the power of amotion resided under the charter. It appeared that the common council, of which body the mayor and aldermen are a part, being assembled on summons, the mayor and aldermen had afterwards, without having been ever summoned in the latter character, proceeded to exercise the power of amotion which belonged to them in that character, in respect to *Poulter*, on account of his not having attended the common council that day; and the Chief Justice (*Pratt*) is reported to have said, "That the mayor and aldermen could do no acts unless they met, 'only as such, upon a regular summons for that purpose.'" That "As they had distinct authorities, they must be summoned in their distinct capacities." That as there was no summons to meet, as mayor and aldermen only, the consequence was, that the acts done by them in that distinct capacity were void. And the Chief Justice is stated afterwards to have delivered the opinion of the Court, that the removal in that case was not regular; for that there should have been a summons "to the mayor and aldermen to meet in their 'distinct capacity.'" And indeed if the doctrine, which is reported to have been laid down in that case, had been applied to one similarly circumstanced with the present, in respect to the attendance of all the members of which the select body consisted, it would have had great weight in deciding the question now before us. But upon looking at the facts of that case, as they are stated in the original record of the mandamus and return in the Crown-office, and with reference to which the language of the Court is to be understood, it appears that the articles of charge, upon which the amotion was founded, were exhibited against him to the mayor and major part of the aldermen only, (the mayor and major part of the aldermen then being assembled;) and that such mayor and major part of the aldermen so assembled adjudged him guilty, and removed him. So that this case differs from that of *The King v. Carlisle* in the very essential circumstance, that all the electors entitled to summons, and who could by any possibility have been present upon any summons, were in fact present in this instance, and consenting to the proceeding in all its parts: whereas in that of *The King v. The Mayor of Carlisle*, a major part only were present; and for all that appears a majority only of such major part might have concurred in the amotion then in question. In the case of *Sir Chr. Musgrave v. Nevinson*, (2 Ld. Raymond, 1358,) which was the case of an election of an alderman by the common council at an accidental meeting; upon a trial at bar, before Lord C. J. Pratt and the other Judges of that Court, it was held by the Court, "that in the case of such an accidental election, every member who had a right to vote ought to be present and assent." The Court thereby clearly intimating their opinion to be, that if every member of the common council, (the elective body,) had been present, and assenting, the

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election would have been good : and which expressly agrees with what Lord Chief Justice *Parker* is supposed to have said in *The King v. Strangeways*, Hil. 1 Geo. 1, according to the statement of that case by Lord *Hardwicke* in his judgment in *The King v. The Mayor, &c. of Shrewsbury*, (Rep. temp. Hardw. 151.) That was a motion for an information in *quo warranto* for having exercised the office of capital burgess of *Bridport*. And the question was, Whether he were duly elected? The case was much debated; and it was expressly the opinion of Lord *Parker* and the whole Court, that “when the acts are to be done by a select number, notice must be given of the time of meeting; and that it is to do some corporate act; though what particular corporate act need not be specified: and in such case the acts of a majority would bind the whole body: or, if *all* were present, though *by accident*, and *without notice*, their acts would be good: but the acts of a *majority*, present *by accident*, would not be binding.” And in the case of *The King v. Wake*, 1 Barnard. 80, the Lord Chief Justice (Lord *Raymond*) is stated to have said on the subject of notice, “that wherever notice is given for one particular business only, the body cannot go on to other business, unless the *whole* body is met, and it is done *by consent*.” Upon these authorities, impugned as we now find by no direct authority to the contrary, as well as upon the reason of the thing, we think that the election of the defendant, made by the whole select body present and consenting, was well made; and that the rule *nisi* for an information in *quo warranto* against him should be discharged.

Roberts v. Monkhouse.

8 East, 547. June 15, 1807.

Service of notice of plea filed on a *Sunday* is void by construction of the stat. 29 Car. 2. c. 7. s. 6, which avoids all *process*, &c. served on that day.

UPON a rule for setting aside the proceedings for irregularity, the question was, Whether the service on a *Sunday* of notice of plea filed were irregular; which it was contended to be by *Wigley*; the stat. 29 Car. 2. c. 7. s. 6, having declared void the service of any writ, *process*, warrant, &c. upon a *Sunday*. *Barrow* said, that a *notice* of this sort was not *process*, and therefore not within the statute. And in *Walgrave v. Taylor*, 1 Ld. Ray. 705, two Judges against one, thought that the delivery of a declaration on a *Sunday* was not within the act; such delivery being as they said; but *quasi* a notice, and as a letter; and not *process*. But by

Lord ELLENBOROUGH, C. J. all notices on which rules are made are *process* in respect to the subject-matter; not indeed *process* with respect to the writ; but *process* in respect to the rule.

Et per Curiam,

Rule absolute.(a)

(a) The statute having absolutely avoided the service of *process* on a *Sunday*; such service cannot be made good by any waiver of the defendant, by not objecting in the first instance. *Taylor v. Phillips*, 3 East, 155.

Gordon and Others v. Secretan.(a)

8 East, 548. June 15, 1807.

Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other; which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it.

IN an action upon a policy of insurance on goods on board the ship *Tom*, at and from the Southern Whale Fishery until her arrival at *London*, the declaration contained an averment that the plaintiffs were interested in the subject-matter of insurance; and the defendant meaning to dispute that at the trial, gave them notice to produce certain articles of agreement between them (who were also owners of the ship) and the captain, whereby, as he contended, it would appear that the captain, (who was not a plaintiff) was interested in one third of the neat proceeds of the cargo: and if so, the defendant, having paid more than enough into court to cover the shares of these plaintiffs, would have been entitled to a verdict, unless the plaintiffs were entitled to recover the remainder of the sum insured as trustees for the captain; which would depend upon the construction of the articles. In pursuance of the notice the instrument was accordingly produced at the trial by the plaintiffs, when there appeared to be two subscribing witnesses to it; and therefore the plaintiffs insisted that the defendant could not give it in evidence without calling one of those witnesses to prove it. And Lord *Ellenborough* being of that opinion, the plaintiffs recovered.

The *Attorney-General* moved at the beginning of the term for a new trial, 1st, on the ground that the instrument coming out of the hands of the plaintiffs, parties thereto, upon notice to produce it, was not necessary to be proved by one of the subscribing witnesses, according to the rule laid down in *Rex v. Middlezoy*, 2 Term Rep. 41. If the deed had been read the other question would have arisen upon the terms of it: and on this he contended, that though the legal interest of the whole cargo might be in the plaintiffs, the ship owners; yet they having agreed, as he contended, to pay one-third of the neat proceeds to the captain and crew, by way of wages, it was not competent for the plaintiffs to insure the whole; because they would be then interested in the destruction of the cargo; for if the whole arrived, they were only entitled to two-thirds of it; but if lost, they would be entitled to recover the whole from the underwriters, without accounting to the captain and crew for their one-third; as they would not be entitled to wages in case of the loss of the ship. Upon the first point,

LORD ELLENBOROUGH, C. J. said, that the case of *The King v. Middlezoy*, which was much questioned at the time, had been since overruled. And that it was not enough to give notice to the opposite party in a cause to produce an instrument in his hands, in order to dispense with any further proof of it by the party giving the notice; but that the production of it at the trial, in pursuance of such notice, did not supersede the necessity of proving it by one of the subscribing witnesses, if any, as in ordinary cases.(1)(2)

(a) I heard the motion made for a new trial, but was not in Court when the rule was finally disposed of; but was informed of the result by the counsel in the cause.

(1) It has been repeatedly decided, that an admission of the execution of a bond, by the obligor, does not dispense with the necessity of calling the subscribing witness, or accounting for his absence. *Abbot v. Plumb*, Doug. 216. *Johnson v. Mason*, 1 Esp. 89. *Fox v. Reil*, 3 Johns. 477. Nor does it make any difference if the admission is made in an answer in chancery to a bill filed for a discovery. *Call v. Dunning*, 4 East, 53. What effect the production of an instrument pursuant to a notice from the opposite party to produce it, shall have, seems not to be so well settled. In *The King v. Middlezoy*, 2

And LAWRENCE, J. said, that this had been so ruled by Lord *Kenyon* in a subsequent case, respecting a will, which the adverse party, in whose hands it was, had notice to produce, and did produce at the trial, when it appeared that there were subscribing witnesses to it; and Lord *Kenyon* held that the party calling for it was bound to call one of the subscribing witnesses to prove the instrument.

Lord ELLENBOROUGH, C. J. added, that the case of a will shewed strongly the necessity of adhering to the strict rule of proof, and the enormity of the general proposition, that the production of an instrument by an adverse party, in consequence of a notice, dispensed with the general rule of proving its execution by a subscribing witness: for if a party were fixed with the possession of an instrument affecting his property, however questionable its execution might be, and even though he had impounded it because it was forged, or had been obtained by fraud: that, according to the argument, was to relieve the party attempting to avail himself of it from calling the subscribing witness.

The Attorney-General, after suggesting the difficulty which parties would be laid under in these cases, from their ignorance of the names of the subscribing witnesses to an instrument till produced at the trial, then offered an affidavit on the part of the defendant, of his being surprized and not prepared at the trial for want of knowing who the subscribing witnesses were; relying on the case of *The King v. Middlezey*, that the notice to produce the articles dispensed with further proof of them when produced.

Lord ELLENBOROUGH, C. J. said, that there could be no objection to his taking a rule to shew cause on the ground of surprize, if ultimately that could be of any avail to him: but, as at present advised, he could see no ground of objection to the insuring of the whole interest in the cargo by the plaintiffs, the owners, who had purchased the whole: nor that it could vary the question, to shew that they had made an agreement with others to pay over to them any part of the neat proceeds of the cargo, when received. For if the ship and cargo arrived, the ship owners were at any rate liable to pay the wages of the captain and crew, whether out of the fund produced by the cargo or otherwise: and if the ship and cargo did not arrive, no wages would be due, and there could be no neat proceeds.

The Attorney-General intimated that this would in effect be an insurance of wages; which could not be made directly.

The Court granted a rule *nisi*; and when the case came on, they would not enter into the question as to the construction of the instrument; but after hearing *Garrow, Park*, and *Taddy* against the rule; and *The Attorney-General* and *Scarlett* in support of it, who again argued upon the sufficiency of the notice to produce the instrument coming out of the hands of the adverse parties, whose instrument it purported to be, without further proof; and which distinguished it, they said, from the case of a will which purported to be executed by a third person; *the Court* made the rule absolute, on payment of costs on the ground of surprize only; and to give the defendant an opportunity of calling the subscribing witnesses.

Term Rep. 41, it was held, that such production was *prima facie* evidence of the execution. The same point had previously been ruled by Lord *Mansfield* in *Thompson v. Jones*, and *Passel v. Godsall*, cited 2 Term Rep. 44. The decision of *The King v. Middlezey* was distinctly recognized by *Buller, J.* in *Bowles v. Langworthy*, 5 Term Rep. 367. In *Sayer v. Kitchen*, 1 Esp. 209, it was contended that the production of the paper made it *per se* evidence, of which the party producing it might avail himself against the party who had called for it; but Lord *Kenyon* held otherwise. The same point afterwards came up in *Wharam v. Routledge*, 5 Esp. 235, before Lord *Ellenborough*; and a contrary decision was had. His Lordship said, if you call for a paper, you make it evidence for the other side, if they think fit to use it. The supreme court of *New-York* seem to have adopted the decision of Lord *Kenyon* in *Sayer v. Kitchen*. *Lawrence v. Van Horne*, 1 Caines, 287. *Kenny v. Clarkson*, 1 Johns. 385. 395.

(2) [See contra, *Betts v. Badger*, 12 Johns. 223. *Jackson v. Kingsley*, 17 do. 158, where the party producing the instrument is a party to it.—W.]

Goodright, on the several demises of T. L. Fowler, and Robert Burton, v. Forester and Another.

8 East, 552. June 16, 1807.

The fine of a tenant for life divests the estate of the remainder-man or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 H. 7. c. 24, is only to save to all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man, who preceded him. But such right of entry is not devisable. The effect of a fine by tenant for life of parcel of a manor, the reversion of which parcel was in the tenant in fee in possession of the other parts of the manor, is to sever such parcel from the manor.

THIS was an ejectment brought to recover possession of a certain tenement called *Hunt's and Jones's tenement in Lawley*, in the parish of *Wellington in Shropshire*; laid in the 1st count upon the demise of *T. L. Fowler*, and in the 2d count upon the demise of *Robert Burton*. At the trial a special verdict was found, stating in substance:

That *Richard Browne*, being seised in fee of the manor of *Lawley*, with the appurtenances, in the parish of *Wellington*, and also of a certain tenement called *Hunt's and Jones's tenement*, in the same parish, which tenement was then parcel of the manor of *Lawley*, on the 22d of *May*, 1677, by will duly executed and attested to pass real estate, "touching his real and personal estate," devised as follows: first, I give to *Anne* my wife, whom I make sole executrix, "my chief capital messuage in *Lawley*, and all lands and hereditaments thereto belonging, and all other my messuages, lands, tenements, and hereditaments, (except hereafter excepted and by me otherwise devised,) and "all mines of iron, stone, and coal, within the lordship of *Lawley*; with "liberty to cut and take mine wood for the said works, to have and hold all "and every the said premises from and immediately after my decease, until "the 26th of *March* 1680, for the better maintenance of herself and her children; she yearly paying unto *Robert Browne* my eldest son 40*l.* for his "maintenance during the said term, and until the said 26th of *March*, 1680." He then charged all his messuages, lands, mines, &c., and all other his fee simple estate in *Lawley* with the payment of certain legacies, to be raised thereout, after the said 26th of *March* 1680: viz. 300*l.*, to each of his daughters, *Anne*, *Irephena*, and *Jane*, and 200*l.* to his daughter *Eleanora Browne*, to be paid to them as they should respectively attain their age of 21 years. And 200*l.* to be paid to his son *Simon Browne*, when he should return to *England*: with a direction that if any of his children should die before payment, his executrix should dispose of the deceased's portion at her discretion to any of her surviving children. He also gave to his daughters *Elizabeth Dod* and *Sarah Browne* 20*l.* each, and 10*l.* to *John Hadley* his grand child, charged upon the said premises in *Lawley*. "Nevertheless, if the said *Robert Browne*, "my eldest son, shall, within seven years after my decease, pay, or sufficiently "secure to my executrix or to the said several legatees, the several sums of "money devised to them, then and immediately after such payment or security "given, the entire lordship or manor of *Lawley* aforesaid (excepting the estate "hereby hereafter devised to the said *Anne Browne*, *Philip Browne*, and "*Eleanora Browne*, in and to the tenement of them or one of them hereafter "limited and appointed) shall descend to the said *Robert Browne*, my eldest "son, as his lawful inheritance; to have and to hold the said manor of *Lawley*, and all other the said premises, (except as herein is excepted) to the "said *Robert Browne* and the heirs of his body, &c.: and for want of such "heirs, the right and reversion of all and singular the said lordship of *Lawley* "to descend to *John Browne*, one other of my sons, and to the heirs of his "body, &c." and so he limited the remainder of the said manor, lands, &c.

to *Philip Browne*, another of his sons, in tail; with the ultimate remainder to his own right heirs. "Except, and always reserved out of this present grant all that one tenement, with all and every the lands and appurtenances thereto formerly belonging, formerly known by the name of *Hunt's and Jones's tenement*, part whereof is now in my own possession, part in *W. A.'s*, and the residue in the possession of *T. C. and A. A.*: all which said last excepted messuage, lands, and premises, and every part thereof, I do hereby give and bequeath unto *Anne* my wife, *Philip* my son, and *Eleanora* my daughter, for and during the term of the natural lives of them the said *Philip* and *Eleanora*, and the longer liver of them: and after the decease of the survivor of them the said *Philip* and *Eleanora*, then the reversion and remainder of the said excepted messuage and premises to remain and be to the executors and assignees of the said *Philip* for the term of 40 years; he the said *Philip* paying to his sister *Eleanora* or her executors 100*l.* for increase of her portion." He then devised to his son *John Browne* and his heirs all his purchased lands in *Marton* in the county of *Salop*, habendum to him and *Anne* the devisor's wife according to the several estates and uses limited to either by an indenture of feoffment before executed by the devisor, dated the 23d of *October*, 19 Car. 2: he the said *J. B.* paying the legacies, and sums of money in the said deed expressed. He also gave to *Anne* his wife, or, in case of her death or marrying again, to his son in law *Jonas Dodd* and *Elizabeth* his wife, the tenement and land called *Colsemare*, near *Lee Hall*, in the parish of *Worthing*, and the lease thereof, for the remainder of the term of 99 years determinable upon two lives in being, in trust for the maintenance and portion of his son *Wm. Browne*. "Item, I devise all my messuages, lands, hereditaments, and cottages in *Wellington*, in *Salop*, to my son *Richard Browne* and his heirs: nevertheless, if my eldest son *Robert Browne* shall pay to the said *Richard Browne* 200*l.* in lieu and recompence of the said inheritance, then my will and intent is, that after such payment the estate and interest of *Richard* my son in the said messuages and premises shall determine, and from thenceforth *Robert* my eldest son shall stand seised of all and every the said messuages and premises in *Wellington*, to the use of himself and his heirs. Item, I give to the said *Richd. B.* my son, and his heirs, all my part of *Wm. Daws's* tenement in *Admaston*, in *Salop*. Item, I give to my eldest son *Robt. B.* four oxen and four cows out of my stock at *Lawley*. And all the rest and residue of my estate, goods, and chattels, real and personal, at *Little Wenlock*, not formerly bequeathed, I do give and devise to my wife *Anne Browne*, whom I hereby appoint to be sole executrix of my will," &c. The testator died seised on the 1st of *June* 1677; and thereupon *Robert* his eldest son and heir entered into the manor of *Lawley*; and *Anne*, *Philip*, and *Eleanora Browne* entered into *Hunt's and Jones's* tenement. And *Robert Browne* being so seised of the manor of *Lawley*, and entitled to *Hunt's and Jones's* tenement, subject, as to the latter, to the estates, terms, and interests therein created by the said will, in *Michaelmas* term 1677, suffered a recovery of the manor of *Lawley*, the uses of which were declared to be to himself in fee. That *Robert Browne* being so seised of the manor of *Lawley*, and *Anne*, *Philip*, and *Eleanora Browne* being so seised of *Hunt's and Jones's* tenement, with remainder to *Robert*, on the 30th of *April* 1682, *Robert Browne* made his will; duly executed and attested, and thereby devised to *T. Langley* and *C. Cludd*, all his personal estate whatsoever, and all the manor of *Lawley*, messuages, lands, and coal-mines, and all other his lands, &c. in *Lawley* aforesaid in the parish of *Wellington*, in *Salop*, and also all other his messuages, lands, or tenements whatsoever in *Wellington* aforesaid, or elsewhere in the county of *Salop*, with their appurtenances, to hold to *Langley* and *Cludd* and their heirs, in trust out of the personal estate and profits of the premises, or by the sale thereof, to pay all his debts, legacies, &c. and the legacies charged on his estate by his father's will; and in case of

no sale, to permit his brother *Wm. Browne* to receive the profits of the premises during his life, with a power of jointuring a wife; and after their decease, to permit their first and other sons (if any) in succession, and their heirs, (or in default of sons, the daughters of *Wm.*) to enjoy and receive the profits. And in case of any sale, that the overplus of the sale-money, &c. should be laid out in purchasing lands to the same uses, &c. And in default of issue of *William*, he gave the remainder of his said estate to his brother *Richard Browne* in tail, remainder to his sister *Sarah Browne* in fee. That *Robert Browne*, the last mentioned testator, died seised on the 1st of *July* 1682, without issue; and upon his death *Langley* and *Chudd*, by indentures of lease and release of the 30th of *June* and 2d of *July*, 35 Car. 2, sold and conveyed the manor of *Lawley*, with the appurtenances, to *Thomas Burton* in fee. The special verdict then found, that *Anne Browne* and *Eleanora Browne*, in the first will named, died on the 1st of *September* 1723, whereby *Philip Browne*, in the same will named, became sole seised for life of *Hunt's* and *Jones's* tenement; the reversion thereof belonging as aforesaid. That in *Hilary* term, 7 G. 2, (1734) the said *Philip Browne* levied a fine *sur cognizance de droit come ceo*, &c., with proclamations, of *Hunt's* and *Jones's* tenement, to the use of *Wm. Forrester* and his heirs; who thereupon entered and became seised thereof. That *Thomas Burton*, being so seised of the manor of *Lawley*, and the premises sold and conveyed to him as aforesaid, upon the 28th of *November* 1735, by his will of that date, duly executed and attested to pass real estate, devised the manor of *Lawley*, and all other his manors, messuages, tenements and hereditaments to the use of *Robert Burton*, father of *Robert Burton* one of the lessors of the plaintiff, for life; remainder to *W. Taylor* and *T. Fowler*, &c. trustees to preserve contingent remainders during the life of *R. Burton* the father; remainder to the first and other sons of *R. B.* the father successively, in tail male; remainder to the use of the right heirs of the said *R. B.* the father. That *Philip Browne* died on the 1st of *July* 1738. And that *Wm. Forrester*, being so seised, on the 4th of *November* 1758, by his will of that date duly executed and attested to pass real estates, devised the premises in the last count mentioned (*Hunt's* and *Jones's* tenement) to *George Forrester* in tail: and died on the 5th of the same *November*; on whose death *George Forrester* entered on and became seised of the same premises, and afterwards suffered a recovery of the same in *Hilary* term 1770; and in *Hilary* 1793, made a feoffment thereof to *V. Vickers* in fee, who in the same term levied a fine thereof *sur cognizance de droit come cea*, &c., with proclamations, to the use of himself in fee: and afterwards by indentures of lease and release in the same year reconveyed the same to *George Forrester* in fee. The special verdict also stated a recovery suffered as of *Michaelmas* term 39 Geo. 3, with double voucher, by *Robert Burton*, one of the lessors of the plaintiff, (a) of the manor of *Lawley*, &c. (including in the general terms of description *Hunt's* and *Jones's* tenement:) and that he thereupon entered into the manor and the other premises expressed to be devised in the will of *Thomas Burton*, (except the tenements (*Hunt's* and *Jones's*) in the last count mentioned) and took the rents, &c. except as aforesaid. That *Thomas Burton* died on the 13th of *February* 1735; and that *Robert Burton* the father died on the 24th of *June* 1803, leaving *Robert Burton*, one of the lessors of the plaintiff, his eldest son and heir at law; who on the 1st of *April* 1805, entered on *Hunt's* and *Jones's* tenement in order to avoid the fine levied by *Philip Browne* and *George Forrester*, and afterwards demised to the plaintiff, &c.

This case was twice argued very learnedly and elaborately: first, in *Trinity* term last, by *Eyton* for the plaintiff, and *Abbott* for the defendant; and the second time in *Michaelmas* term last, by *Williams*, Serjt. for the plaintiff, and

(a) This was in his father's lifetime, and was left unexplained.

Sir *V. Gibbs* for the defendant: but the Court in giving judgment, made so compendious a statement of the arguments and answers on either side, upon the principal points on which the judgment turned; and entered so fully into the authorities on which they were founded, that it would be superfluous to detail them. But several previous questions arose; Whether by virtue of the words of exception respecting *Hunt's* and *Jones's* tenement, in the devise to *Robert Browne*, the testator's eldest son, of the manor of *Lawley, &c.* the reversion of that tenement, after the deaths of the tenants for life and the determination of the term of 40 years for the benefit of *Philip Browne*, were undisposed of by the will, and descended to *Robert Browne* the testator's eldest son in fee; or whether, upon the construction of the whole will, that reversion passed to the eldest son, as parcel of the manor of *Lawley*, in tail; and if not, whether it passed under the subsequent devise to *Richard Browne*? But upon this last point it was observed by the Court, that if that were insisted on, there ought to be a *venire de novo*, as the question had never been submitted to the jury, whether the 200*l.* had been paid to *Richard* by *Robert Browne*, on which the devise to him depended. On the discussion of these questions, the particular provisions of the will, which are shortly adverted to in the statement of the case, were commented upon, and several authorities were quoted: but in the result it became unnecessary to decide these questions, and another which arose out of the case, namely, Whether the recovery suffered by *Robert Browne* the son, supposing he were only tenant in tail of that reversion, operated to pass it. But the principal questions, and those on which only the judgment of the Court turned, were, Whether, admitting that *Tho. Burton*, who claimed by conveyances from *Robert Browne*, had at one time the reversion in fee of *Hunt's* and *Jones's* tenement in him; such reversion were divested and turned into a right of entry or action by the operation of the fine levied by *Philip Browne* the tenant for life: and if so, whether such right of entry or action could pass by *Tho. Burton's* will, without his having made a previous entry in his lifetime to avoid such fine?

There was also another question on the first argument, upon the effect of the recovery stated to have been suffered by *Robt. Burton*, one of the lessors of the plaintiff, in *Mich. 1798*. That recovery was stated at full length in the special verdict, (the substance only of the other recovery and fines being stated; a practice which the Court commended,) because there was no deed stated to lead the uses of it: and therefore it was attempted to be argued that the lessor of the plaintiff, who appeared to vouch and entered into warranty, and against whom there was judgment of recovery, was estopped to say that the estate did not pass out of him to the use of the recoverer. Though it was argued on the other side, that *Robert Burton*, the lessor of the plaintiff, appeared then to be out of possession: and that it did not thereby appear, nor was found by the special verdict, that *Griffiths* and the other persons who sued out the writ were seized of the freehold at the time; so that there was no good tenant to the *præcipe*: and that, at any rate, where no deed to lead the uses appeared, the recovery would enure to the old uses under the will of *Thos. Burton*. But no notice was taken of this latter point on the second argument. The Court took time to consider of their opinion till now, when judgment was delivered by

Lord ELLENBOROUGH, C. J.—On the trial of this ejectment at the Summer assizes for the county of *Salop* 1806, and which was brought to recover a certain tenement called *Hunt's and Jones's* in the parish of *Wellington* in that county, the jury found a special verdict, stating, That *Richard Browne* being seized in fee of the manor of *Lawley*, of which a certain tenement called *Hunt's and Jones's* was parcel, by his last will and testament in writing, duly attested so as to pass real estates, dated the 22d of *May* 1677, devised all his messuages, lands, tenements, and hereditaments, and, *inter alia*, the manor or lordship of *Lawley*, (excepting the estate thereby after devised to

Ann Browne, Philip Browne, and Eleanor Browne, in and to the tenement to them, or one of them, thereafter limited and appointed,) to *Robert Browne* his eldest son, to have and to hold the same (except as thereafter excepted) to his said son *Robert Browne*, and the heirs of his body lawfully begotten, with divers remainders over. Except, and always reserved out of the said grant, all that one tenement known by the name of *Hunt's and Jones's* tenement: all which said last-excepted messuage, lands, and premises, and every part thereof, he thereby gave and bequeathed to his wife *Ann Browne, Philip*, his son, and *Eleanor*, his daughter, for and during the term of the natural lives of the said *Philip* and *Eleanor*, and the longest life of them: and after the decease of the survivor of them, the said *Philip* and *Eleanor*, then the reversion and remainder of the said excepted messuage and premises to remain and be to the executors and assignees of the said *Philip* for the term of 40 years, &c. That on the 1st of *June* 1677, *Richard Browne*, the testator, died seised, without altering his will; and that in *Michaelmas* term 1677, *Robert Browne*, his eldest son, suffered a recovery of the manor of *Lawley*, the uses of which were declared to be to himself in fee. And on the 30th of *April* 1682, made his will, duly attested to pass real estates, and thereby devised the manor of *Lawley* to *T. Langley* and *C. Cludd* and their heirs, in trust to sell; and died on the 1st of *July* 1682, without altering his will. That by indentures of lease and release, dated the 30th of *June* and 2d of *July* 1683, *Langley* and *Cludd* conveyed the same to *Thomas Burton* in fee. That *Ann Browne* and *Eleanor Browne* died in 1723, leaving *Philip Browne* surviving them, who thereby became sole seised of the said tenement called *Hunt's and Jones's* for the term of his life, with a remainder to the said *Philip* for the term of 40 years: and afterwards in *Hilary* term 7 Geo. 2, 1733-4, levied a fine with proclamations of the said tenement to the use of *William Forrester* and his heirs; who thereupon entered. That on the 28th of *November* 1635, *Thomas Burton* made his will, duly attested to pass real estates, and thereby devised the manor of *Lawley* to *Robert Burton* for life; remainder to trustees to preserve contingent remainders, &c.; remainder to his first and other sons in tail; which first son the lessor of the plaintiff is. That on the 13th of *February* 1735-6, *Thomas Burton* died. That on the 1st of *July* 1738, *Philip Browne* died. That on the 24th of *June* 1803, *Robert Burton*, the son and devisee of *Thomas* the deviser, died, leaving his son the lessor of the plaintiff his heir at law, who entered upon the tenement in question on the 1st of *June* 1805, to avoid all fines levied thereof. That on the 1st of *July* 1778, the term for 40 years in the premises which had belonged to *Philip Browne*, expired.

This special verdict has been twice argued, and each time very ably by the counsel on both sides, and several points have been made; but it will not be necessary to notice any excepting those upon which the opinion of the Court is founded; as the other points were either abandoned in the course of the argument, or do not touch the questions, upon which the Court, after very anxious consideration, have made up their minds, and which in their judgment will determine this case. Those questions are two; first, whether the fine levied by *Philip Browne* devested the estate of *Thomas Burton* the reversioner. And 2dly, supposing that it did, whether the interest which remained in *Thomas Burton*, after the fine levied, passed by his will.

For the plaintiff it was said, that if the tenant for life levy a fine, the reversioner or remainder-man is not bound to enter till the regular determination of the preceding estate: and that the alienation of the tenant for life only accelerated the period of his, the reversioner or remainderman's right of entry, but did not take that right away when the life should have determined. That it is no where said, that the fine of a tenant for life turns the estate of the reversioner into a right, as the fine of tenant in tail does. That during the life of the tenant for life a fine does not affect the remainder-man. That there

is a distinction between alienations which turn estates to a right, and such as do not. Co. Litt. 327. b. That there can be no disseisin, unless the freehold is taken from the tenant. Litt. sect. 279. Co. Litt. 181. a. ib. 153. And as the tenant for life has the freehold, he can by no act of his own, such as a fine levied by himself, be ousted of the freehold. That there is a wide difference between a man being ousted by the wrongful act of a stranger, and the levying a fine by a tenant for life, who is not turned out thereby. That supposing the fine could have the effect contended for, if it had been levied of the manor of *Lawley*, it could have no such effect, as it was levied only of *Hunt's* and *Jones's* tenement, which was parcel of the manor of which *Thomas Burton* was in possession: for if any rent had been reserved for that tenement to the lord, he might have distrained: Litt. sect. 590, 591. That a man cannot be ousted of a reversion, so long as his tenant is in possession. Shep. Touch. 23. That rent and common are not barred by a fine; and that they do not differ in this respect from a reversion. And for these reasons it was insisted, inasmuch as *Thomas Burton* died during the life of *Philip Browne* the tenant for life, (who had a lawful estate for his life, and during whose life *Thomas Burton* was not bound to enter for the forfeiture,) that *Thomas Burton* had such an interest as would pass by his will. And as to the case put by Litt. sect. 416, which was relied on for the defendant, it was said, that it is not there stated whether the tenant for life was living during the continual claim; but that, upon comparing the text with the commentary it would appear that he must have been dead; and therefore, that it only amounted to this, that if a party do not enter within five years after he is bound to enter, the right will be bound: but that it was no authority to shew that the estate would be divested during the life of tenant for life. That the continual claim can only be necessary to prevent an entry being tolled: but that here *Thomas Burton* was not bound to enter during *Philip Browne's* life: for which 2 Vesey 482, was cited as an authority. But if this were otherwise, it was contended on the authorities of *Roe v. Jones*, 1 H. Black. 30. 3 Term Rep. 94. *Smith v. Coffin*, 2 H. Black. Rep. 444. *Roe v. Griffiths*, 1 Black. Rep. 606. *Goodtitle v. Wood* cited in 3 Term Rep. 94, and reported in Willes 211, that *Thomas Burton* had an interest which was deviseable.

For the defendant it was on the other hand insisted, that the fine levied by *Philip Browne* divested the reversion of *Thomas Burton*; leaving nothing in him but a mere right of entry; which is not deviseable, though it may be released: and in support of that position were cited Shep. Touch. 325. Litt. sect. 347. Co. Litt. 214. a. and 266. a. and 48. b. Perkins, sect. 86. (edit. 1642), and Lord *Eldon's* doctrine in *The Attorney-General v. Vigor*, 8 Ves. jun. 282. And this latter case was distinguished from that of *Roe v. Jones*, 1 H. Black. 30, and 3 Term Rep. 94, by observing, that in that case the devisor devised all he had ever had: but in this case the devisor, whose interest had been divested by the operation of the fine, had nothing left in him which he could make the subject of devise by his will. And to shew that the fine divested the remainder, Litt. sect. 416, and Lord *Coke's* Comment on it, and *Focus v. Salisbury*, Hardress 401, 2, were relied on. The passage in *Littleton*, it was said, proved that without continual claim of the tenant for life, the remainder-man in fee could not enter; because the remainder would be divested by the fine: and that in *Focus v. Salisbury* Lord *Hale* had expressly stated, that a fine by tenant for life displaced the estate in remainder; distinguishing between a fine by tenant for years, and tenant for life: saying, that the fine of the first displaced no estate: but that the fine of the latter did. And in answer to the argument derived from the circumstance of the fine having been levied of *Hunt's* and *Jones's* tenement, and not of the manor; it was said, that the effect of the fine was to separate that tenement from the manor; which we are of opinion that it did; and that the fine divested the estate of *Thomas Burton*: and that the authorities cited, viz. Co. Litt. 251. 327. b. and

Focus v. Salisbury, Hard. 401, are in point. And that the answer of my brother *Williams*, viz. "That a remainder-man is not bound since the stat. 4 Hen. 7. c. 24, to look to his estate till the determination of the preceding estates," is not satisfactory: for though that statute prevented the laches of antecedent remainder-men from prejudicing those who followed; as it did before the statute of non-claim 34 Edw. 3. c. 16; yet it has not preserved the right of the subsequent remainder-men, by at all altering the immediate effect of the fine upon the remainders; but by giving all the remainder-men rights of entry within five years after their respective titles, &c. should accrue; and thereby preventing their rights from depending on the conduct of the person, whose right of entry accrued immediately on the forfeiture. And this position we think warranted by the following cases: *Moor* 71. pl. 192, cited in 3 Co. 78. b. as *Laune and Toker's case*. Cro. Eliz. 220. *Smy v. June and others*, 2 Lev. 52. *Whaley v. Tankard*. And *Salvin v. Clark*, in Cro. Car. 157. And our opinion is, that the effect of *Philip Browne's* fine was to divest the estate in reversion of *Thomas Burton*; leaving in him only such right of entry as the forfeiture incurred by reason of the fine authorized him then to exercise: and if that should not be thereupon presently exercised by him, leaving in him a future right of entry, to be exercised within five years after the determination of the estates for life, and of the remainder for the term of 40 years. As to the argument of my brother *Williams*, grounded on the position, that a man cannot be ousted of his reversion so long as the tenant for life is in the possession: it is sufficient to observe that in this case the tenant for life did not continue in possession after the fine levied; but gave to the donee of the fine a seisin and possession adverse to the interests of the reversioner.

This brings on the consideration of the 2d question; which is, whether such right of entry be deviseable: and we are of opinion that it is not deviseable. For such right is certainly not assignable by the common law: nor does it fall within the words of the stat. 32 H. 8. c. 1, which are, "having manors, lands, tenements, or hereditaments;" nor of the stat. 34 & 35 Hen. 8. c. 5. s. 4, which are, "Having a sole estate or interest in fee simple of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder." If the devise of *Thomas Burton* were stated upon record in any pleadings at common law, what description of interest, falling within these words, could he be stated to have had at the time of the devise? The opinion of Lord *Eldon* in *The Attorney-General v. Vigor*, 8 Ves. jun. 282, was certainly against it: and the case of *Roe v. Griffiths*, 1 Black. Rep. 606; *Goodtitle v. Wood*, Willes 211, and *Roe v. Jones*, 3 Term Rep. 94, do not shew that such right of entry is deviseable: as in those cases the devisors devised all the interest they had ever had. And Lord *Thurlow*, 1 Ves. jun. 255, supposed, in order to bring executory interests within the statutes of wills, that they must have been considered as executed by the statute of uses; which is a very different interest from a right of entry for the purpose of re-vesting a divested estate. In *Corbet's case*, 1 Co. 85. b. "For the construction of wills, this rule was taken by the justices in their arguments; that such an estate, which cannot by the rules of the common law be conveyed by act executed in his life, by advice of counsel learned in the law, such estate cannot be devised by the will of a man who is intended by law to be *inops consilii*:" from whence it may be inferred, that out of that interest, in which by act executed in a man's life it is not possible to create any estate, no estate can be created by his will. And in *Butler and Baker's case*, 3 Coke 32, a. it is said, "without question that which a man cannot dispose of by any act in his life shall not be taken for any of his manors, &c. whereof he may devise two parts by authority given him by the statute." And in Lord *Mounjoy's case*, Godbolt 17 it is laid down "that the statute of wills, 32 Hen. 8, that it shall be lawful, &c. to devise two parts, &c., respects only such things as are

divisible:" but a right of entry is not divisible; and therefore, according to the terms of the statute and the authority of that case, is not devisable. For these reasons we are of opinion, that there must be judgment for the defendant. And whatever mischief or hardship may attend the decision of this case, or may be expected to arise from the application of the same rule to other cases, it is an inconvenience which can, if our judgment be well founded, only be remedied by positive law. And the propriety of applying such a remedy, whereby the same rights of entry and action which belong to the heir may be extended to the devisee, is a question particularly fit for the consideration of the legislature. Upon the law as it now stands, we feel ourselves obliged to give

Judgment for the Defendant.(1)

The King v. Sarah Seale.

8 East, 568. June 16, 1807.

The stat. 42 G. 3. c. 119, against illegal lotteries, directing the penalty to be distributed, 1-3d to the king, 1-3d to the informer, & 1-3d to the person apprehending or securing the offender: a conviction directing the penalty to be distributed *as the law directs*, without ascertaining to whom the last third is to be paid, (the person being uncertain) is bad. But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose.

THE following conviction upon the stat. 42 Geo. 3. c. 119, against unauthorized lotteries, &c. was returned by *certiorari* into this court—"City and Liberty of Westminster, in the county of Middlesex, to wit—Be it remembered, that on the 4th of March, 47 Geo. 3, &c. At the public-office in Great Marlborough-street(a) in the parish of St. James, within the liberty of W. &c. J. Nichols of Piccadilly, &c. one of the overseers of the poor of the parish of St. James, within the said liberty, &c. comes before me P. N. Esq. one of the justices of our lord the king, assigned to keep the peace in and for the said city and liberty, &c., and giveth me the said justice to be informed, that S. Seale, of Walker's-Court, &c. within the liberty, &c. single woman, after the passing of the act (42 Geo. 3. c. 119,) &c. viz. on the 15th of February 1807, at the said parish &c. did unlawfully receive and take of and from G. May, of the said parish, &c. 1s. 3d.; and in consideration thereof did then and there promise and agree to and with the said G. M. to pay to him 1l. 1s. upon a certain event and contingency relative and applicable to the drawing of a certain ticket numbered 9, in a certain unlawful game or lottery called a Little Goe; the same being a game or lottery not authorized by parliament; contrary to the said act, &c.: whereby and by force of the said statute the said S. Seale hath forfeited 100l. &c. And afterwards, on the said 4th of March 1807, at the public-office in Great Marlborough-street aforesaid, in the said parish, &c. the defendant is brought before me the said justice at the public-office aforesaid; by W. C. and J. B. two of the beaules of the parish of St. James aforesaid, &c. and charged before me with being guilty of the said offence contained in the said complaint and information. Whereupon I, the justice aforesaid, do now here proceed to inquire and examine into the circumstances of the case, &c. in the presence and hearing of the defendant. And thereupon, on the same day, &c. at the Public-office in Great Marlborough-street aforesaid," &c. The conviction then proceeded to set out the evidence given by the witnesses, whereby it appeared that the offence was com-

(1) This judgment was afterwards affirmed on a writ of error in the *Exchequer Chamber*. 1 Taunt. 578—615.

(a) It was admitted, after some discussion, that this description did not sufficiently denote that the conviction was made by one of the Police Magistrates, under the stat. 42 Geo. 3. c. 76, &c.

mitted by the defendant on the 15th of *February* last, at a house in *Walker's-court* in the parish of *St. James*, where she was found; and that on their going there again on the 4th of *March*, the defendant prevented them by force from making any further examination. That the defendant was called upon for her defence, but did not produce any evidence to prove that she was not guilty, &c. The conviction then proceeded; "And thereupon all and singular the premises being heard, &c. it manifestly appears to me, the said justice, that the defendant is guilty of the premises and offence charged upon her in and by the said complaint and information. It is therefore considered by me, &c. that the defendant be convicted, and she is by me the said justice accordingly convicted, of the offence charged upon her in and by the said charge and information; and for which said offence I the said justice do adjudge her the said *S. Seale* to forfeit and pay 100*l.* to be applied and distributed, when paid, as the law doth direct: and the said defendant is now here by me required immediately to pay such penalty of 100*l.* which she neglects and refuses to do: therefore I the said justice do adjudge the said defendant to be committed to *Tothillfields* Bridewell, there to remain for six calendar months, without bail or mainprize, and without appeal, or until such penalty of 100*l.* shall be satisfied. In witness, &c. at the Public-office in *Great Marlborough-street*," &c.

Marryat took several objections to the conviction, the principal of which arose on the 5th section of the act; directing the penalty to be applied, one-third to the king, another third to the use of the informer or informers, and the remaining third to the person or persons apprehending or securing the offender. And the last description of persons being uncertain, he contended that the justice having only adjudged the distribution of the penalty as the law directs, without specifying to whom in particular the last third should be paid, the conviction was bad for uncertainty: and he referred to *Retz v. Dimpsey*, 2 Term Rep. 96, as in point. There the objects of the distribution were certain, namely, the party grieved, and the poor of the parish; but the proportion to each was left in the discretion of the magistrate: here the proportions are certain, but the persons are not all ascertained: the principle is the same. Here also an additional inconvenience would ensue to the defendant; who cannot tell to whom to pay the penalty, in order to get discharged; and it can only be paid to those to whom it is given by the act. It is not even stated in fact who did apprehend or secure the defendant: and it cannot be implied from the term used, that she was brought before the magistrate by the two beadles. In *Retz v. Priest*, 6 Term Rep. 538, a conviction adjudging a distribution of part of a penalty which the statute on which it assumed to be founded directed to be paid to the poor of the parish, to be paid to the poor of the township, was held void. And in *Retz v. Hall*, Cowp. 60, a commitment in execution on the stat. 6 G. 1. c. 48. s. 1, against cutting down ash timber trees, for not paying the penalty and charges of conviction, was held bad, because the magistrate had not ascertained what the amount of the charge was. Another objection was, that it did not appear that there was any Little Goe, &c. But it was answered that it was sufficient that the money was taken for that purpose.

The Common Serjeant, contra, contended that the act having directed to whom and in what proportion the respective shares should be distributed, it was enough for the conviction to adjudge that it should be distributed as the law directs, according to *The Queen v. Barrett*, Salk. 363. And that if no persons could claim the 3d share given to the person or persons apprehending or securing the defendant, by bringing themselves within that description, that share would remain in the Crown; and that a payment to the magistrate or gaoler for the Crown would be deemed sufficient payment by the defendant to entitle herself to be discharged. But he also suggested that the two beadles who are stated to have brought the defendant before the magistrate answered the description of persons securing her.

Marryat in reply observed, that the act, by limiting specifically one third of the penalty to the Crown, negatived its claim to any other third: and that there was no authority given either to the magistrate or the gaoler to receive the third share of the persons apprehending or securing the offender. After consideration for a few days,

Lord ELLENBOROUGH, C. J. delivered the opinion of the Court.

This was a conviction before a magistrate of the county of *Middlesex*, upon an information for an offence under the stat. 42 Geo. 3. c. 119. s. 5, made "for the suppression of games and lotteries not authorized by law." The act directs, "that where the party accused shall be convicted of the offence, and such penalties (i. e. of 100*l.*) shall not be immediately paid, it shall be lawful for the magistrate to commit the offender to prison for any space of time, not exceeding six calendar months, nor less than one calendar month, without bail or mainprize, and without appeal, or until such penalty shall be satisfied." And further directs "that every such penalty, when paid upon conviction, shall go and be applied, one-third thereof to his majesty; one-third thereof to the use of the informer or informers; and the other third thereof to the person or persons apprehending or securing such offender or offenders." The information and evidence given in support of the same, as stated in the conviction, appear to have warranted the magistrate in drawing therefrom the conclusion he did; viz. that the defendant was guilty of the offence charged upon her. The conviction then further proceeds in these words: "It is therefore considered by me, the said justice, that the said *Sarah Seale* be convicted, and she is by me, the said justice, accordingly convicted of the offence charged upon her in and by the said charge and information: and for which said offence I the said justice do adjudge her the said *Sarah Seale* to forfeit and pay the sum of 100*l.*, to be applied and distributed, when paid, as the law doth direct." It then proceeds to state, that she was required to pay the penalty immediately, which she neglected and refused to do; and was thereupon committed to prison for six calendar months, &c.; in the terms directed by the act. It has been argued, on the authority principally of *The King v. Dimpsey*, 2 Term Rep. 96, that this conviction is bad, inasmuch as it contains no adequate adjudication in respect to the penalty, so as to render it properly applicable and distributable amongst the several objects of such distribution, under the act of parliament: the words of the conviction being only, "to be applied and distributed, when paid, as the law directs." And although a judgment, *quod convictus est, et forisfaciat*, or even perhaps *quod convictus est* alone, may, as was held in *The King v. Chandler*, (Salk. 378,) be sufficient, where the statute, acting upon the facts stated in the conviction, is competent of itself to carry the conviction into full unequivocal execution and effect; it is otherwise where the immediate legal consequences of the conviction are made by the statute to depend upon the discretionary judgment of the Court. If therefore the punishment which is to follow upon conviction be either discretionary as to its kind; or being certain in its kind, (as a pecuniary penalty, for instance,) is uncertain in its amount; or where, being certain in its amount, either the particular description of persons, amongst whom the distribution is to take place, is uncertain: or the individuals answering such particular description, and to whom shares of the penalty are to be assigned, are in any manner the subject of discretionary selection and appointment; in all such cases, the magistrate or court, before whom such conviction is had, must, at the time of the adjudication, actually exercise his or their discretion upon these particulars, and thereby ascertain what would otherwise remain wholly undecided and uncertain. In the present instance, the mere adjudication of a conviction of the offence, and of a forfeiture of the penalty of 100*l.* to be distributed as the law directs, leaves it wholly undecided whether there exist in this case the last of the three descriptions of persons, amongst whom the penalty is to be distributed under the act; viz. "*persons apprehending or*

securing the offender." This description is not specifically and in terms applied to any person or persons whatever on the face of this conviction: it is therefore left to be supplied by argument and inference, whether there be any such persons in this case to whom the description in the act of parliament applies; and whether the two persons, by whom the offender is stated to have been brought before the convicting justice, were understood by him, and must in legal construction be considered by us, as having been meant by him to take that one-third part of the penalty, which the act assigns, *eo nomine*, to "persons apprehending or securing the offender." Nor can the want of this necessary ascertainment of the objects of distribution be obviated or supplied in the way suggested by Mr. Common Serjeant; i. e. by considering the whole penalty as vested in the Crown, in the first instance, by the adjudicature of the forfeiture; and all of it as still remaining in the Crown, which does not on the face of the conviction appear to be taken out of it, and by subsequent adjudication thereof to belong to any other persons well entitled under the act to a definite portion or portions of it. For the question still recurs, whether any persons do or do not appear, upon the face of the conviction, to whom the required description properly applies: so as that, in the absence of all such persons, the whole may be considered as belonging to his majesty: a point not only material to be distinctly ascertained, as between the Crown and such parties; but also as between the person convicted, and the several parties interested in the proportions into which the penalty is directed to be divided, with a view to the due and convenient satisfaction and payment afterwards of the penalty itself by the person convicted. On the ground therefore of the uncertainty which appears upon the face of this conviction, as to the objects of that distribution of the penalty which the act requires to take place, we are of opinion that the conviction is defective, and cannot be sustained.

Conviction quashed.

Gould and Others v. Robson and Keymer.

8 East, 576. June 16, 1807.

If the holder of a bill of exchange when due, after taking part payment from the acceptor, agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to such agreement; though the drawer might have had no effects in the hands of the acceptor.

ONE Hudson drew a bill, dated the 29th of September 1806, for 766*l.*, at three months, on *Iselin*, which was accepted by him, and was payable to *Richardson* or order; who indorsed it to the defendants; and these indorsed it to the plaintiffs; who held it when it became due, and applied to the acceptor for payment, and agreed to receive from him about half the amount, and to draw a bill on him for the remainder, payable at a future short date, (a) which he accepted: and that until such last mentioned bill was paid, they, the plaintiffs, should keep the original bill in their hands as a security. And the second bill being afterwards dishonoured by the acceptor, the plaintiffs, the indorsees of the original bill, brought this action on the bill against the defendants as indorsers; who resisted payment, on the ground that the plaintiffs had given time to the acceptor, by which they were discharged. To this it was answered, that the plaintiffs had only endeavoured to get as much as they could from the acceptor, which was so much in discharge of the indorsers; and that the delay that had intervened was in attempting to secure the remainder. And the plaintiffs also attempted to shew, that no injury in fact had arisen to the de-

(a) Qu. a month.

defendants from the delay; for that there was cross paper existing at the time between the latter and the acceptor. But this was denied by the defendants; and the evidence did not go to shew how the balance of that account stood. But, on the other ground, it appeared to Lord *Ellenborough* at the trial merely as a case of getting part payment from the acceptor, without any injurious laches on the part of the plaintiffs to the prejudice of the defendants: and under that impression a verdict was found for the plaintiffs. The abovementioned facts were, however, afterwards brought neatly before the Court, disentangled from the collateral circumstances of the case, upon a motion for a new trial by

The Attorney-General, (with whom was *Marryat*) who shewed that this amounted to a giving time to the acceptor by the holders of the bill, which precluded them from resorting afterwards to the defendants, as indorsers: for the situation of the latter was thereby altered; they not having an opportunity of enforcing their claim upon the acceptor, so soon as they would otherwise have had, if they had had earlier notice of the dishonour of the bill. And he referred to *Tindal v. Brown*, 1 Term Rep. 167, for the general rule, that if the holder give time to the acceptor of a bill after it is dishonoured, the indorser is thereby discharged: and to *Rees v. Berrington*, 2 Ves. jun. 540, where it was held, that an obligee of a bond with a surety (which he assimilated to the case of an indorser who was surety to the indorsee for the acceptor) taking notes from the principal and giving him further time, without communication to the surety, discharged the latter, whose situation was thereby altered: also to *Walwyn v. St. Quintin*, 1 Bos. & Pull. 652, 5, and *English v. Darley*, 2 Bos. & Pull. 61, where the entering into a new agreement with the acceptor for securing the payment of the bill was considered as a discharge by the holder of the other parties on the bill.

A rule nisi having been granted; Lord *Ellenborough*, C. J. after reporting the facts, said, that his opinion had been formed at the trial upon considering this merely as a case of part payment by the acceptor; which of itself would not have discharged the indorser; but that if the holder had made any bargain with the acceptor for giving him further time for payment, as the case now appeared to be; thereby not only binding himself but all others whose names were upon the bill from suing upon it while it was in his hands; he put the indorsers in a different situation from what they were entitled to be in; and could not therefore refer back to them, when the acceptor failed to fulfil the new contract he had entered into with him.

Park and *Bowen* however still pressed to shew cause against the rule; alleging that the acceptor having no effects of the drawer's in his hands; but this being merely an accommodation bill between those two; no injury could arise to the drawer or indorsers from the delay; which differed this from the other cases. They admitted, that it had been ruled in *Tindal v. Brown*, that if time were given to the acceptor, it discharged the indorser, though the principal point there was as to the reasonableness of the time: and that this was followed up by *English v. Darley*; but it did not appear in the latter case but that the indorser might have been damnified by the giving time to the acceptor. In the subsequent case, however, of *Clarke v. Devlin*, 3 Bos. & Pull. 363, the Court of C. P. held, that if the holder gave notice to the drawer of his intention to take a security from the acceptor, and the drawer made no objection; that should not discharge him; because, as some of the Judges there said, the drawer was not injured; and that the ground of discharge in these cases was, that the holder by giving time to the acceptor did an act by which the drawer was injured. But the drawer cannot be injured where he had no effects in the hands of the acceptor at the time; and therefore the principle of those cases does not apply to the present.(1)

(1) It is to be observed, however, that this action was not against the drawer, but the

LORD ELLENBOROUGH, C. J. How can a man be said not to be injured, if his means of suing be abridged by the act of another? If the plaintiffs, holders of the bill, had called immediately upon the defendants for payment as soon as the bill was dishonoured, they might immediately have sued the acceptor and the other parties on the bill. I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time: he may make what arrangements he pleases with the acceptor; but he does that at his peril: and if he thereby alter the situation of any other person on the bill to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill: (1) but here the holder did something more: he took a new bill from the acceptor, and was to keep the original bill till the other was paid. That is an agreement that in the meantime the original bill should not be enforced: such is at least the effect of the agreement; and therefore I think time was given. His Lordship then observed, that in strictness the defendants were entitled to enter a nonsuit, the objection having been taken at the trial: but that if the plaintiff's counsel thought he could alter the present state of the facts upon a new trial, he might take it in that shape on payment of costs. This, however, was afterwards waived, as I was informed, and judgment of nonsuit was entered.

Welsford v. Todd.

8 East, 581. June 17, 1807.

By stat. 44 G. 3. c. 96, schedule B. the duty which before was laid on horses let to hire to *travelling post* by the mile or stage, is now laid on horses let to hire to *travel by the mile or stage*: and persons licensed by schedule A. of that act to let horses to hire to *travel post* by the mile or stage must account for the duty according to schedule B. on such lettings to hire as are therein mentioned. But *quære* as to lettings to hire *for the day* to go to certain places and back again.

THIS was an action of *assumpsit* brought by the plaintiff, as farmer of the post horse duties, to recover from the defendant the sums of 3s. 3d. and 1s. 9d. as the duties due from him to the plaintiff on the several lettings of a horse in manner aftermentioned. At the trial before Lord *Ellenborough* at the sittings at *Westminster*, a verdict was taken for the plaintiff for 3s. 3d. on the first count, and 1s. 9d. on the second count, subject to the opinion of this Court on a case reserved; which, after the first argument, was by desire of the Court turned into a special verdict, in substance as follows:

The plaintiff, at the respective times of letting to hire, and using of the horses aftermentioned, and of the charging to and receiving from *J. Langley* and *G. Coryndon* aftermentioned the respective sums of money aftermentioned, was, according to the form of the statute, the farmer and collector of the duties imposed by the statute or statutes in such case made, in respect of every horse *hired by the mile or stage* to be used in *travelling* in *Great Britain*, for every mile such horse was hired to travel; and in respect of every horse hired for a less period of time than 28 successive days for drawing on any public road any carriage used in travelling post, or otherwise; which accrued or became payable at the times when and the places where the said horses hereinafter mentioned were respectively so let, hired, and used; and is entitled to the respective sums of 3s. 3d. and 1s. 9d. as such duties, if the defendant be liable to pay the same. The defendant, being a person usually let-

indorser, and want of effects of the drawer in the hands of the acceptor is never an excuse for laches in relation to the indorser. *Wilkes v. Jackson*, Peake's Ca. 202. *Scarborough v. Harris*, 1 Bay 175.

(1) Vide *James v. Badgers*, 1 Johns. Ca. 131. Chitty on Bills 231, Story's edit.

ting horses to hire, was, at each of those times, a person who had, according to the form of the statutes in such case made, taken out a licence, which was then in force, and was then duly licenced to let to hire any horses *for the purpose of travelling post, by the mile, or from stage to stage*, and also to let to hire for a day, or any less period of time than 28 successive days, any horses for drawing any carriage used in travelling post or otherwise. As to the letting mentioned in the first count, the jury found, that on the 29th of *May 1806*, at *Bath* in the county of *Somerset*, *J. Langley*, hired of the defendant, who let to hire to him, a horse *to be used in travelling, and to travel 26 miles in the following manner; viz. J. Langley* then and there informed the defendant that he wanted to hire a horse of him *for the then next day*; upon which the defendant then and there asked *Langley*, whether the said horse was to go upon that occasion from *Bath*: to which *Langley* answered, that he wanted to ride the same to *Hinton Blewett*, 13 miles from thence, and back again from *Hinton Blewett* to *Bath* the same day: whereupon the defendant said to *Langley*, very well; you shall have a good horse, and I shall charge you 5s. for the same: which *Langley* then and there agreed to. And the horse was accordingly let and hired by the said parties respectively; and was on the then next day used by *Langley* under that hiring in travelling, by his riding it from *Bath* to *Hinton Blewett* and back again (the distance between the two places being 13 miles) on a public road, and was kept by him for that purpose the greatest part of the day. And the defendant afterwards on the same day charged to and received from *Langley* the said 5s. for the same. As to the second hiring, laid in the second count, the jury found that on the 31st of *May 1806*, at *Bath*, *G. Coryndon* hired of the defendant, who let to hire to him, another horse *to be used in travelling, and to travel 14 miles in the following manner; viz. to ride from Bath to Bradford*, a space of 7 miles, and back again from *Bradford* to *Bath*; for which the defendant was to be paid 4s. by *Coryndon*. And the horse was on the same day used by *Coryndon* under the lastmentioned hiring in travelling, by his riding on the same from *Bath* to *Bradford*, and back again to *Bath*, on a public road; the distance between *Bath* and *Bradford* being 7 miles. And the defendant afterwards on the same day charged to and received from *Coryndon* the said 4s. for the same. The jury then found that the defendant at the proper time and place, delivered in to the plaintiff, as the farmer and collector of and entitled to the duties, his stamp-office weekly account of the duties imposed by the statutes on horses let to hire by and hired of him by the mile or stage to be used in travelling in *G. B.*, which accrued in the week in which the same horses were so let to hire and used as aforesaid; and did not account for or pay, nor hath accounted for or paid, to the plaintiff *Welsford* any duty whatsoever in respect of the same horses so let to hire, &c. That the said horses, before either of them had been so let, hired, or used as aforesaid, but in the same year, had been returned by the defendant to the assessor under the stat. 43 Geo. 3. c. 161, and 45 Geo. 3. c. 13, as horses kept for the purpose of letting to hire, in order that the defendant might be assessed for the same under those statutes; and the defendant had been rated and assessed for the same under those statutes, viz. under schedule E. annexed to the last of those statutes; and had paid to the assessor for the king's use for the year in which the same were so let, hired, and used as aforesaid 2l. 8s. for each of those horses. That the said horses have not, either of them, ever been let by the defendant, save as aforesaid, before the commencement of this action, which was commenced on the 17th of *June 1806*.

After the decision of the case of *The King v. Tooley*, 3 Term Rep. 69, upon the stat. 25 Geo. 3. c. 51. s. 4, that the letting of a horse to hire (which in that case was by a butcher in a town to a neighbour of his, an officer of the spiritual court) for the purpose of going upon business from one town to another and back again on the same day, was not such a letting to hire for

the purpose of *travelling post*, within the popular sense of those words, as subjected the owner of the horse to the penalty imposed by that act for want of taking out a licence for that purpose; the case of *The King v. Swift* (a)

(a) The following note was furnished to the counsel in the cause, as having been taken by a short-hand writer.

The King v. Swift.

Exchequer, Mich. 30 Geo. 3.

THIS was a scire facias in the Exchequer upon the bond entered into by the defendant under the stat. 25 Geo. 3. c. 51, on receiving his licence to which he pleaded performance; and the *Attorney-General* in the replication assigned several breaches upon letting of horses to go from *Liverpool* to *Preston*, and other short distances, within the limits of the act for regulating the *Liverpool* hackney coaches. After full argument,

ERLE Ch. B. gave judgment.—The question in this case will depend principally upon the construction of the 42d section of the stat. 25 Geo. 3. c. 51, imposing duties, first, on horses hired by the mile or stage; secondly on horses hired for a day or any less period of time, for drawing on any public road any coach or other carriage used in travelling post. It is to be observed that the language of this section is as general as it can be; every horse hired by the mile or stage shall be deemed to be travelling post. If it is to be restrained to a particular sense, not every horse hired by the mile or stage, but certain horses hired by the mile or stage for particular purposes, are to pay the duty. The context must not only support but demand such a restriction; especially as the words describing the purposes of the hiring are here omitted for the first time, and therefore it should seem studiously omitted. If we look back to the context, it will be very clearly seen, that the great object of taxation was *travelling post* in its popular sense; which popular sense agrees with the legislative definition of the term *travelling post* in the act of the 8 Ann. travelling several stages on a post road, and changing horses; except that the popular sense does not require that the road should be a post road. It must be admitted that the regulations of the act have this object in view throughout all the clauses, particularly the 32d and 33d sections. But though the aggregate of the several stages to be travelled is to make the fund of the duty productive, the duty itself is charged upon every *separate* hiring by the stage: and this manner of charging the duty is at once breaking the chain and reducing it to the several links of which it was composed. And suppose the 42d section had not been to be found in the statute, I conceive that even the popular sense of travelling post must have been relaxed, and that it could not have been necessary, to make the duty attach upon the hiring to go one stage, that the person hiring should go on another stage, or change horses; and that hiring by the stage, for one stage, would have been deemed a hiring to be used in travelling post. If I had sent for hackney horses to draw my chaise to *Hounslow*, the duty would have attached upon that stage whether I had staid there or proceeded; I may add, whether the chaise were fitted as a litter, and I were to take six hours in going, or whether the horses flew with me. If that be so, I find nothing left in the idea of hiring horses by the stage to be used in travelling post, as applied to this subject of taxation, but the hiring hackney horses to go from one place to another. It may be asked, if such would have been the construction of the act, without the aid of the 42d section, why was that section introduced? I presume for this purpose; to exclude all doubt whether the legislature meant to use the words *travelling post* in the strict sense in which travelling post is defined by the stat. 8 Ann. that is travelling several stages, and changing horses, upon a post road. I am inclined to think this was the object of the 42d section; for it does not dispense with the necessity of travelling several stages or changing horses generally; it is travelling several stages *on a post road*, or changing horses, which I construe changing horses *on a post road*; understanding this to be a plain reference to the statute of Ann. which is in these words; “travelling several stages on a post road,” and “changing horses:” not saying “changing horses *on a post road*,” but that undoubtedly is its sense. What fortifies my observation is, that the subsequent members of the section dispense with nothing but what immediately belongs to the Post-office; “although there shall not be any post-house, and although there shall not be any post settled or established on the road or any part of the road.” So that if the words *travelling post*, in the clause imposing the duty, were to be understood in the extended popular sense, notwithstanding this 42d section, it would be still necessary to make the duty attach, that the traveller should go several stages, and change horses, on roads, (not *post roads*;) which certainly cannot be supposed to be the meaning of this law. The 42d section might be introduced for another purpose; I will suppose for a moment that all I have said upon the construction of this statute is erroneous; if there must be a travelling post, or quasi travelling post, according to the true intent of the former clauses; and if the 42d section dispenses with travelling several stages on all roads equally; still there is a purpose for which this section might well have been

introduced; which still requires that the language of it should be understood in its universal sense, and does not require that we should do violence to that language by wresting it to a particular purpose. The second object of taxation in this statute is horses hired *by the day or part of the day*, to draw carriages upon a public road, to be used in travelling post, or otherwise. Without attempting to point out the difference between travelling post with horses hired *by the day*, and horses hired *by the mile or stage* I confess to my understanding it is obvious that if there be a difference, this duty must be evaded. The duty may be evaded only by varying the contract, and making it a travelling by the mile or stage;* to prevent which this section might be provided; and therefore the act has said that every hiring by the mile or stage shall be deemed a hiring to travel post. For either of these purposes we are not called upon to wrest the words of this clause from their primary and obvious sense to a more limited one. For what purpose should we? It is said, to make the clause consistent with the other clauses, which make *travelling post* an ingredient in the hiring; and to avoid the absurdity of first providing for special hirings, and then resolving them all into one general one. It will be recollected that I do not agree to the construction of the clause which raises this argument; but let us see how far it can be carried. Shew me how it can be made out that the clause is consistent with the former clauses, if there might still be a travelling post, or quasi travelling post, when these essentials of travelling several stages, and changing horses, are dispensed with. What is there left by which travelling is to be determined to be travelling post? The counsel did not resolve that difficulty when I stated it. I have never been able to resolve it upon the further consideration I have given it. I can do very well without post roads, without post horses, and posts established in the road: but if we take away the idea of *several stages*, and *changing horses*, what is there left but moving with hired horses from one place to another? And if it be considered what difficulties this uncertain notion of travelling post would impose, why are any difficulties to be thrown in the way? for it best agrees with the whole scope of the act that every hiring by the mile or stage shall be a hiring to travel post. Why should not a man pay a proportionable tax for the privilege of transporting himself from one place to another place, when he must pay it if he moves on to a *second* place? The statute directs that he shall pay; and therefore this excludes the argument: and the construction we put upon the 42d section protects the duties in the mode in which they are to be raised, and prevents fraud. The authority of *The King v. Tooley* was much pressed upon us: and we have not made up our minds upon this case, without attending to that case, and giving it due consideration: and to say that the greatest respect is due to the solemn opinion of one of the superior courts, and especially under the circumstances stated, by which it appears that that opinion was affirmed upon deliberation and inquiry, is in truth but to repeat what fell from me in the course of the argument. I do not mean to enter into an examination of the particular reasons assigned for that judgment. It is enough that I have stated the reasons for the judgment which we shall pronounce. But I will say thus much respecting that case; that it is a case upon its circumstances very distinguishable from the present. First, it is distinguishable upon the fact: that was a hiring from *Tetness to Ashburton and back again*, and, to be at home the same day; which goes very near to the idea of its being a hiring for a day, and not a hiring by the mile or stage. But upon the law, which is a better ground, the apparitor's case, as was truly observed in the course of the argument, was not intended to be within the spirit of this law; for if he had hired the horse *by the day*, he would not have been within any of those clauses, nor within the province of the statute. It never was intended to subject a man who hired a single horse *by the day* to any tax under this law. If that sort of contract were not intended to be taxed, it would be as unreasonable to tax him, by turning his hiring into a hiring *by the mile or stage*, as it would be to suffer him to escape taxation by turning it into a hiring *by the day*. The spirit of the law was preserved by that decision, as much as by our decision it would be outraged and violated, by adjudging that this was not a hiring *by the stage*; and therefore we hold that *The King v. Tooley*, ought not to govern this case. But the carriage in this case was one of the *Liverpool* hackney coaches, and was used within the limits, within which they are made subject to the regulations of the corporation of *Liverpool*, who have rated certain fares for certain distances; and this coach was employed within those distances. This is certainly a popular objection, and sounds very plausible; and I think much better applies than the same kind of objection would apply in *The King v. Tooley*: for hackney coaches certainly do not often travel post; whereas butchers' horses, I believe, never travel any other pace. But the consideration of the velocity with which people travel was very properly abandoned, as not being distinction enough to enter into the constituents of *travelling post*. I thought it was extremely difficult to shake the argument upon this idea of a hackney coach. Hackney coaches, it is said, are established and regulated at *Liverpool*. They are regulated; but it can be hardly said that they are established; for any man may keep one who will, but he must submit to certain regulations. But what has that to do with the taxation put on his labour to be paid, by the person using his coach? The regulations are the condi-

* Qx. by the day.

was decided in the Exchequer which was considered as throwing great doubt upon the former decision, though it did not in terms profess to overrule it. The stat. 25 Geo. 3. c. 51, on which those decisions turned, required, s. 4, that "every postmaster, innkeeper, " or other person in *G. B.* who let to hire any horse for the "*purpose of travelling post by the mile, or from stage to stage,*" &c. should pay so much for an annual licence: and that "in respect " of every horse hired by the mile or stage to be used in travelling post, there " should be charged (a certain duty) for every mile such horse should be hired " to travel post." And s. 42 declared, "that every horse hired by the mile or " stage should be deemed to be hired to travel post; though the person hiring " the same did not go; or travel several stages upon a post road, or change " horses; and although at the stage or place at or to which such horses should " be hired, there should not be any post house; and although there should not " be any post settled or established on the road, or any part thereof, upon which

tions by which he is allowed to let to hire within a particular distance. The regulations imposed by this statute for the purpose of securing this duty may happen to distress this sort of business which is carried on by a hackney coach: it may even make it very difficult for a hackney coachman to go on with his business. That may be a very good reason for getting an exemption in his favour, and it operated in the case of the *London* hackney coaches. It is not for us to inquire why it did not operate in favour of the *Liverpool* hackney coaches: it is enough that the same exemption is not introduced. The only intelligible way in which the argument could be put, upon this circumstance of the coach being a hackney coach employed at *Liverpool*, as it struck my mind, was, that a hackney coachman plying for and carrying his fare within the limits could not with propriety be said to let to hire by the mile or stage. For the purpose of assisting this argument a stage was defined to be a place in the progress to some other place: but stage and place, both in the statute of Ann. and the 22 Geo. 2, which was made to introduce some new regulation with respect to the Post-office Act, and this statute of 25 Geo. 3, are clearly synonymous. In more than one place in these statutes stage or place is used synonymously. It was said there could be no contract here, because the price was fixed by superior authority. Let me suppose that the rates of post chaises were fixed all over the kingdom, as it was once in contemplation to do, (I remember the subject under discussion in parliament,) would that prevent this tax from operating, for want of a letting to hire? In truth, this question has received a parliamentary decision; for in the Post-office Act the postmaster has the exclusive privilege of letting to hire post horses; and yet in the very same act the particular rate he is to take for that hire is fixed; so that there cannot be a more direct authority, that a rate being established in the construction of these words, "*letting to hire,*" does not prevent there being a letting to hire. This defendant has then let his horses to hire, and by the stage; for it was to go to a particular place beyond the local limits of the town of *Liverpool*. And I lay stress upon these words; because the Court do not choose, in a case where the facts do not oblige them, to encounter the difficulty of determining whether a letting to hire to pass from one part of the town of *Liverpool* to another part will bring the party within the law. I observe that the statute, where it speaks of a hiring by the day speaks of horses drawing carriages on a public road; and it is possible that circumstance may be a material ingredient, whenever it shall be necessary to raise the argument, whether travelling from one part of a town to another part shall be deemed within this law, and considered as travelling on a public road. If there had been a provision in favour of the *Liverpool* hackney coaches similar to that of *London*; which by the way affords a strong argument against the defendant upon the general construction of the statute; and also a strong argument against him, because he is not within the exemption, and others are: if he could have been brought within that clause, or have been otherwise exempted, it might have been then necessary to have inquired whether in the particular instances stated in this case, the defendant was acting as a hackney coachman, when, in two of them, he received more than the regular fare; and, in one, he was hired, not upon the stand, but at his own house. And I think it would be extremely difficult to have found that he was then acting as a hackney coachman. We give no precise opinion upon that; because it was the wish of the parties that we should determine the question, as far as we could with propriety, upon the hackney coach, used strictly as such; and therefore we shall give an opinion upon that ground. And we are of opinion for the crown upon this case, upon this ground, that the horses of a hackney coach drawing that coach upon a public road, from *Liverpool* to *Preston*, and the other places, for regulated fares, are within this act of parliament let to hire, by the stage, and as such to be deemed to be used for travelling post within the meaning of this law, for the purpose of being made liable to the duty; which duty not having been regularly charged by the defendant, and the proper ticket delivered, this bond is forfeited; and therefore judgment will be for the Crown.

"such horses should be hired to go," &c. Then, after the decisions in the two cases above mentioned, followed the stat. 44 Geo. 3. c. 98, which repeals the former duties, and gives (s. 2.) new duties according to schedules A. and B. And schedule A. directs the licence to be taken out "by every postmaster or other person who shall let to hire any horse, &c. for the purpose of *travelling post* by the mile, or from stage to stage," &c., using the same term as in the former act. But schedule B. imposes the duty "on every horse, &c. hired by the mile or stage to be used in *travelling* (omitting the word *post*,) for every mile such horse, &c. shall be hired to *travel*," &c.

The Attorney-General and Dampier, therefore, who argued(a) for the plaintiff, relied principally on the omission of the word *post* in schedule B., as denoting the purposed intention of the Legislature to lay the duty on every horse hired *by the mile or stage*, without advertent to the popular sense of the phrase *travelling post*, which had created the difficulty in the *King v. Tooley*: and ascribed the introduction of the word *post* in schedule A. imposing the duty on the licence to mistake; a mistake however which could not affect the present case, where the duty on the hiring was in question. On the other hand, *Puller* for the defendant relied on the insertion of the word *post* in schedule A., on which a construction had been put in *Rez v. Tooley*, as bringing this case within that decision, and that no travelling was meant to be taxed in the manner contended for, unless it were a *travelling post* within schedule A., as the obligation to account must correspond with the licence.

The argument naturally branched itself into two parts, on the two different hirings, the one by *Langley*; which was contended by the defendant's counsel to be a hiring in effect *for the day*, though the particular stage were also specified; which was merely to ascertain the hire. And the Court having great doubts upon that view of the case, no judgment was finally given upon it: the inclination of the Court being that it was rather a question of evidence for the jury to have decided, whether, taking the whole of what passed between the parties at the time they contracted by the day or by the stage; the place to which the horse was said to be going were of the substance of the contract, or only a representation of the extent of the use intended to be made of it, in order to ascertain the charge. And therefore the Court suggested, that it would be better to exclude the statement of *Langley's* hiring from the special verdict. And after a few days consideration upon *Coryndon's* hiring,

Lord ELLENBOROUGH, C. J. stated the opinion of the Court shortly; that whatever doubt there might have been on the question as it occurred in the case of *The King v. Tooley*, rendered still more doubtful, as it was, by the determination in *The King v. Swift*, which could not be reconciled with the former opinion; at any rate, all doubt was now excluded by the positive terms of schedule B. in the stat. 44 G. 3. c. 98, leaving out, purposely as they must consider, the word *post*, as connected with travelling; and that in two places. Upon which description of travelling, viz. travelling *post*, the opinion in *The King v. Tooley* had been formed. And that this was not contravened by the insertion of the same term of travelling post in schedule A., imposing the duty on the licence to let horses for travelling post. But the Court must understand from schedule B. that the Legislature meant to lay the tax on horses let out to travel by the mile or stage: and therefore upon the last count, which was upon the hiring by *Coryndon*, there must be

Judgment for the Plaintiff.

(a) The case was twice argued, once in *Hilary* term last, and again in this term.

Sparkes and Another v. Martindale.

8 East, 593. June 17, 1807.

Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt, and an injunction is granted *pro tempore* on condition of paying the debt into court; which is done accordingly: and afterwards the money is paid over: held that the bail were damnified by such payment of money into court after notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon dissolving the injunction. For one who agrees to indemnify, and save others harmless against a certain engagement, is bound to secure them from incurring any expence, as it runs on at the time, which falls upon them by virtue of that engagement.

THE plaintiffs had become bail for the defendant in an action brought against him by one *Duddell*, which action was compromised upon the giving of certain money securities by the defendant payable at different periods, for which it was agreed that *Duddell* should hold the bail-bond as a security; and the defendant thereupon gave a bond of indemnity to the plaintiffs and a warrant of attorney to confess judgment; by which he agreed to indemnify and save harmless the plaintiffs against all sums of money, costs, and expences, &c. which they should pay and incur by reason of their becoming bail. And previous to the 1st of *February* 1806, the period to which the last insolvent debtor's act (46 Geo. 3. c. 108,) refers for the discharge of such debtors, some of the securities not having been paid when due to *Duddell*, he had sued the plaintiffs upon their bail bond: and they immediately after that action commenced filed a bill in the Exchequer against *Duddell* for an injunction; suggesting that his demand against the defendant was for a gaming debt, and without consideration: and that Court granted an injunction upon condition that they should pay the amount of the securities then due into court, to abide the issue of that inquiry; which money was accordingly paid into court on the 14th of *June* 1805. On the 1st of *February* 1806, the defendant was in custody at the suit of another creditor for less than 1500*l*: and after that period, the money paid into court by the plaintiffs, under the bill filed by them against *Duddell*, was taken out of court by the latter: and thereupon the bill was dismissed. After which, in *August* 1806, the plaintiffs entered up judgment on the bond and warrant of attorney against the defendant; and were afterwards served by him with notice to shew cause why he should not be discharged out of custody under the insolvent debtor's act. And having been discharged, as now alleged, by mistake, (for if the plaintiffs' debt existed before the 1st of *Feb.* 1806, he was not entitled to be discharged,) the present rule was obtained by the plaintiffs, calling upon the defendant to shew cause why he should not be retaken and remanded in execution. And the question was, whether the indemnity bond given to the plaintiffs, the original bail, were forfeited before the 1st of *February* 1806; which depended on another consideration, whether the plaintiffs were damnified by the commencement of the action against them on the bail bond by *Duddell*, or by the filing of their bill in equity against him for an injunction, or by the payment of money into court in that suit, which money was ultimately, but after the 1st of *February* 1806, taken out of court by *Duddell*.

Marryat shewed cause, and contended in the affirmative, as well from the necessary expence incurred by the plaintiffs, sued in their character of bail, as from the filing of their bill, and actual payment of money into court, which they were compelled to do in self-defence, for want of the defendant's paying the money due, or taking the expence of defending his bail upon himself.

The Attorney-General and *Barwis*, in support of the rule, said, that the filing of the bill in equity and the payment of the money into court were both voluntary acts of the plaintiffs; and if any damnification to them they were

only such expences as they chose to submit to, and might have avoided, and which did not necessarily arise out of their character of bail : and the taking of the money out of court, which only was equivalent to the payment of the original debt, did not happen till after the 1st of *February*, till when it was uncertain whether the plaintiffs were bound to pay any thing. Then as to their being sued, that cannot constitute a damnification ; for it had not appeared before the 1st of *February* 1806 but that they might have been sued wrongfully ; and if so, they would have been entitled to judgment and their costs ; which would have been no damnification. 1 Roll. Abr. 432. l. 42. But supposing the bond were forfeited before the 1st of *February* ; what debt could the bail have then proved, so as to entitle themselves to share the insolvent's effects ? the money was not paid over to the original plaintiff till afterwards. If a bond be given to indemnify one against a breach of covenant, and the bond be forfeited before the obligor's bankruptcy, yet it cannot be proved under his commission, because sounding in damages.(a)

Lord ELLENBOROUGH, C. J. said, that it did not distinctly appear upon the affidavits that the plaintiffs had given notice to the defendant of the action brought against them upon the bail bond ; and that he had refused to bear the expence of it as it accrued : for they were entitled, not merely to be indemnified from expence actually incurred, but to be saved harmless from the incurring of any by reason of their engagement, which was to prevent their being damnified. The bond would not be forfeited merely by *Duddell's* bringing the action against them : but if *Martindale*, after notice, did not immediately take upon him the defence of the suit, but let them pay the expence as it went on, he did suffer them to be damnified : and whatever the event of the suit might be, they would have to pay the difference between the actual and the taxed costs. His Lordship then asked, if the plaintiffs could make an affidavit that they had given the defendant notice of the required payment of money into court, and that he had neglected to provide the fund for that purpose, which was the damnification they had alleged : for that would shew the bond to have been forfeited before the 1st of *February* : and it being admitted by the defendant's counsel that he had received such notice, and that the plaintiffs had paid their own money into court,

The Rule was discharged.

(a) *Goddard v. Vanderheyden*, 3 Wils. 262. 2 Blac. 784.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ABATEMENT.

AS by the practice of the Court they will not grantoyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad withoutoyer; the effect isto prevent such a plea from being pleaded; and therefore if pleaded the Court will quash it. *Deshons v. Head*, E. 46 G. 3. 183

ACCORD AND SATISFACTION.

See BAIL-BOND, No. 1.

ACTION, COMMENCEMENT OF.

Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet having been once waved, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms v. Powell*, T. 46 G. 3. 251

ACTION ON THE CASE.

See PLEADINGS, 8 WARRANT, 1. WAY, 1, 2.

1 Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush-wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of an escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose

of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, c. 23, and 12 Ed. 4. c. 7: and the right to convert a brush-wood into a stone weir, is not evidenced by shewing that 40 years ago two thirds of it had been so converted, without interruption; and the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld v. Hornby, Clerk*, H. 46 G. 3. 95

2 After a warranty of a horse as sound the vendor in a subsequent conversation said, that if the horse were unsound, (which he denied) he would take it again and return the money. This is no abandonment of the original contract, which still remains open; and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne v. Whale*, H. 46 G. 3. 131

3 A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal, to any coal mines, &c. under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made: but it required the owners to give notice to the Company of their intention to work their mines within ten yards of the canal; and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners; held that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the Company the latter did not purchase out their rights; and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the Company in not purchasing. *The Company of Proprietors of the Wyrley and Essington Canal*

- Navigation v. Bradley and Others*, E. 46 G. 3. 176
- 4 Aliter, where the canal act provided that in working such mines no injury should be done to the canal. *Birmingham Canal Company v. Hawesford*, cited. *ib.*
- 5 And aliter, where the house of one claiming under a grant from the owner of the soil was undermined by him. *Earl of Lonsdale's case*, cited. *ib.*
- 6 The declaration in an action on the statute 9 G. 1. c. 22. s. 8, to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the parish (instead of the "town, village, or hamlet," which are the words of the act,) near the place, &c.; yet as the law prima facie intends every parish to be a vill, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook v. The Hundredors of Pimhill*, H. 47 G. 3. 370
- 7 A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure after it has been executed at the defendant's expence, at least not without tendering the expences he had been put to: and therefore no action lies, as for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, E. 47 G. 3. 429
- 8 An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient: though if the evidence be of negligence only, which was properly left to the jury, and negatived by them, the Court will not grant a new trial, because the jury were directed that want of skill alone would not sustain the action. *Seare v. Prentice*, E. 47 G. 3. 448

ADMINISTRATION, *Letters of*.

- 1 The original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another, the first not being recalled. *Elden v. Keddell*, H. 47 G. 3. 376
- 2 A payment of a debt to an administratrix de facto is sufficient; though the letters

of administration were afterwards recalled. *ib.*

- 3 A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived him, if she died afterwards without having taken out administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold; so as to connect a residence for those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the death of the intestate and his widow, before such administration granted. *The King v. The Inhabitants of Horsley*, E. 37 G. 3. 474
- 4 A mandamus lies to the ordinary to grant administration to a sole next of kin; or to grant it to one or other of the next of kin where there are several. *Rez v. The Inhabitants of Horsley*, E. 47 G. 3. *ib.*

ADMINISTRATOR AND EXECUTOR.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. *Crosse et Uxor, Administrators of Reader, v. Smith and Munt, Executors of Grierson*, H. 46 G. 3. 118

ADVOCATE.

No mandamus lies to the archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at Cambridge, as an advocate of the Court of Arches. *The King v. The Archbishop of Canterbury*, H. 47 G. 3. 387

AFFIDAVIT TO HOLD TO BAIL.

- 1 An affidavit to hold to bail, stating that the defendant was "justly indebted to the plaintiff in 100*l.* upon and by virtue of a certain bill of exchange drawn by the defendant, and long since due and unpaid," is sufficient, without stating in what character the bill was due to the plaintiff, whether as payee or indorsee. *Bradshaw v. Saddington*, M. 46 G. 3. 51
- 2 An affidavit to hold to bail, only stating that the defendant was "indebted to the

plaintiff in 54*l.* for goods sold and delivered, (not stating by the plaintiff to the defendant,) and as the acceptor of a bill of exchange," is insufficient. *Perks v. Seavern,* H. 46 G. 3. 94

- 3 An affidavit to hold to bail, only stating that the defendant was "indebted to the plaintiff for goods sold and delivered, (not saying by the plaintiff to him, the defendant,) is insufficient. *Cathrow v. Haggart,* M. 47 G. 3. 341

- 4 An affidavit of debt made by the plaintiff, residing in a foreign country, before a foreign magistrate, whose signature to the jurat and his authority in that country to administer oaths and take affidavits were verified by a proper affidavit in this country, is a sufficient foundation for a Judge's order to hold the defendant to special bail: and this, notwithstanding the stat. 12 G. 1. c. 29, which requires an affidavit of the cause of action by the plaintiff; by which must be understood such an affidavit taken before a competent jurisdiction in this country, whereon, if false, perjury might be assigned: for that part of the statute is restrictive of the acts of plaintiffs only, and not of the Courts. But any person making or knowingly using a false affidavit so made abroad for this purpose is guilty of a misdemeanor in attempting to pervert public justice, and is punishable by indictment. *Omealy v. Newell,* E. 47 G. 3. 455

AGREEMENT.

See ASSUMPSIT, LANDLORD AND TENANT, 6.
SEAMEN, 2. USURY. WARRANTY, 2.

ALIEN ENEMY.

Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country in his ships, into our colonial ports, was licensed by the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington v. Inglis,* H. 47 G. 3. 413

ANNUITY.

The annuity act, 17 Geo. 3. c. 26, as appears from the whole purview of it, is confirmed throughout to annuities granted upon *pecuniary* consideration; though the first clause, in the terms of it, requires a memorial of every annuity bond, &c. to be inrolled. It is not enough therefore for the defendant to plead generally to an action on a bond conditioned

for the payment of an annuity, the consideration whereof does not appear upon the face of the bond or condition set forth upon oyer, that it was sealed and delivered after the passing of the act, and that *no memorial* of it was inrolled; without showing that the consideration was *pecuniary*; but such general plea is bad on demurrer. *Horn, Executrix of Horn, v. Horn and Another,* T. 46 G. 3. 247

APPEAL.

The justices are bound by stat. 9 G. 1. c. 7. s. 8, to receive and adjourn an appeal made by the next Sessions after an order of removal made, against such order, if no notice have been given to the respondent; though they should be of opinion that the order was executed in sufficient time before the Sessions to have enabled the appellants to give reasonable notice of their appeal to the respondents. *The King v. The Justices of Shropshire,* T. 46 G. 3. 257

- 1 The *St. Alban's* paving and regulating act, 44 G. 3, empowers five commissioners, assembled at a public meeting holden by virtue of the statute to do certain acts; amongst others, to deliver notice in writing to any inhabitants to abate nuisances and encroachments in the street before their houses; and on failure, empowers the commissioners to abate them; and gives an appeal to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act:" held that an appeal lay against such notice in writing: such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts. *The King v. Kingston and Others,* M. 47 G. 3. 313

- 2 Though the act says, that "all monies paid, expended by or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however they may afterwards recoup themselves out of the fund in the treasurer's hands. *ib.*

- 3 The party appealing to the Sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lewther v. The Earl of Radnor,* M. 47 G. 3. 344

APPRENTICE.

See SETTLEMENT BY APPRENTICESHIP.

STAMP, No. 1.

- 1 Where upon a habeas corpus to bring

up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 Geo. 2. c. 19, for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till 25, and that when he came of age he elected to avoid the indentures, after which the offence imputed had been committed; for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return to remand the party. *Ex Parte Gill*, E. 46 G. 3.

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2 Where the master and father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master, but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *The King v. The Inhabitants of Cromford*, M. 47 G. 3.

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ASSUMPSIT.

See GUARANTEE, 2.

- 1 A creditor for goods sold and delivered to a trader who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the mayor's court of London against the garnishee, who thereupon paid him the amount of the debt so attached; afterwards a commission issued; held, that this payment was not protected by the stat. 19 G. 2. c. 32, not being a payment made by the bankrupt in the usual and ordinary course of trade and

dealing; and held that the assignees of such bankrupt, under a third commission issued against him, might sue for and recover back such payment, although the bankrupt who had obtained his certificate under his former commissions, had not paid 15s. in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors under the second commission respectively. *Hovil and others, Assignees, &c. of Wardell, a Bankrupt, v. Browning*, H. 46 G. 3.

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2 A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account, as collateral security. And after notice of a loss upon those policies, the policy broker, at the bankrupt's request, gives his own acceptance to the defendants (which was afterwards paid,) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy: held, that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt; though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands. *Hovil and others, Assignees of Wardell, a Bankrupt, v. Pack and another*, H. 46 G. 3.
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3 After a warranty of a horse as sound, the vendor in a subsequent conversation said, that if the horse were unsound (which he denied) he would take it again and return the money. This is no abandonment of the original contract, which still remains open: and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne v. Whale*, H. 46 G. 3.
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4 A premium paid on an illegal insurance, though not in fact known to the parties to be so, cannot be recovered back. *Lubbock v. Potts*, T. 46 G. 3.
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5 Where the plaintiff declares upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff had been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let into such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, quære, if the work done be

- wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice. *Basten v. Butter*, T. 46 G. 3. 225
- 6 Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry, to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15, yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them. *Young v. Brander*, M. 47 G. 3. 299
- 7 If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action. *Pitcher v. Bailey*, H. 47 G. 3. 369
- 8 Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar. *Boot v. Wilson*, E. 47 G. 3. 430
- 9 Money paid by A. to B., in order to compromise a *qui tam* action of usury brought by B. against A., on the ground of an usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received. For the prohibition and penalties of the stat. 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand in this respect, in *pari delicto*, nor is particeps criminis with such compounding informer or plaintiff. *Williams v. Hedley*, E. 47 G. 3. 461
- 10 And such recovery may be had, although, E.'s assignees had before recovered from B. the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be E.'s money;) there being no evidence at the trial of this cause to shew that A. the present plaintiff was privy to that suit. *ib.*

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- 5 The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause. *Hewell v. Harding*, E. 47 G. 3. 464

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- 1 Upon a reference of all actions, controversies, &c. and also of two distinct matters of difference; if the arbitrator omit to decide one of such distinct matters, that vitiates the whole award; which cannot therefore be enforced by attachment. *Randall v. Randall*, M. 46 G. 2. 45
- 2 Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the stat. 9 & 10 W. 3. c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed: and he cannot be attached for a contempt of court if after such revocation and notice the arbitrators make an award, and the submission be made a rule of court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne and others, Assignees of Rhodes and another, Bankrupts, v. Gratix*, T. 46 G. 3. 283
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- 2 Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the stat. 9 & 10 W. 3. c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed: and he cannot be attached for a contempt of court if after such revocation and notice the arbitrators make an award, and the submission be made a rule of court. But it seems that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne and others, Assignees of Rhodes and another, Bankrupts, v. Gratix*, T. 46 G. 3. 283
- 3 Where an award is made after the time originally given to the arbitrators, but authority was also given to them to enlarge the time; an award within the enlarged time authorized is good upon the face of it, though it do not recite that the arbitrators did in fact enlarge the time: but the Court will not grant an attachment for the non-performance of the award without the verification of that fact. *George v. Lousley*, M. 47 G. 3. 301

- 4 Where the costs of the cause and of the special jury, are distinctly and separately submitted to the discretion of arbitrators, they must distinctly adjudicate upon each; otherwise the award is bad; (but the plaintiff in this instance agreed to abandon it for so much.) *ib.*
- 5 The award was also set aside for so much as the arbitrators, without authority, had directed to be paid for their own expenses. *ib.*
- 6 An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodgson*, M. 47 G. 3. 312
- 7 After the delivery of an award, the arbitrator cannot, though within the time limited by the submission, correct a mistake in the calculation of figures, by making another award corresponding to the admitted proportions of a partnership fund. *Irvine v. Elnon*, M. 47 G. 3. 319
- 8 Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award; but is only matter for application to the equitable jurisdiction of the Court to set aside the award. Neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action. *Braddick v. Thompson*, E. 47 G. 3. 445
- 9 The submission being of *all matters* in difference between the parties, an award of so much to be paid by the defendant to the plaintiffs on their *banking account*, is binding between them; for no other matter in difference between them shall be intended, unless it be shewn: and the award is good for so much, though the arbitrators also awarded a sum to be paid by the plaintiffs to the defendant out of a partnership fund in which others than the defendant were interested who were no parties to the submission. *Ingram v. Milnes*, T. 47 G. 3. 492
- 10 The time limited by the stat. 9 and 10 W. 3. c. 15. s. 2, for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of *nisi prius*. *Synge v. Servoise*, T. 47 G. 3. 501

BAIL.

See AFFIDAVIT TO HOLD TO BAIL.

- 1 The defendant, a seaman, being out upon bail on process for a debt under 20*l.*, was impressed into the king's service; and as he would have been entitled to his discharge, if in custody, by virtue of the stat. 32 G. 3. c. 33. s. 22, the Court on application of the bail ordered an exoneretur to be entered on the bail-piece in the first instance. *Robertson v. Patterson*, T. 46 G. 3. 193
- 2 Bail in error, who were excepted to and did not justify, were relieved from proceedings against them, though no other bail had been put in: but they were made to pay the costs up to this time, the plaintiff having been induced by former cases to proceed against them. *Gould and another v. Holmstrom*, T. 46 G. 3. 271
- 3 After default made in not putting in special bail in time, it is not enough that bail are afterwards *put in*; but the plaintiff may take an assignment of the bail bond and proceed thereon, unless the bail be also *justified*, though not before excepted to. *Turner v. Cary and others*, T. 46 G. 3. 283
- 4 A defendant arrested, held to bail, and rendered, and afterwards superseded for want of being charged in execution, cannot be held to bail again upon bills of exchange given by him before he was rendered, as a collateral security for the damages and costs recovered against him in the former action, and upon agreement for a stay of execution till default made in payment of the bills. *Daniel v. Dodd*, E. 47 G. 3. 441
- 5 Where the defendant in the action gave a cognovit for the debt and costs payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable: yet held that the bail were liable for the whole condemnation-money; the entire debt, qua debt, being due instantan, with a stay of execution only for certain portions at certain times. *Shakespeare v. Phillips*, E. 47 G. 3. 486
- 6 Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunction is granted pro tempore on condition of paying the debt into court; which is done accordingly; and afterwards the money is paid over: held that the bail were damaged by such payment of money into court, after notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon dis-

solving the injunction. For one who agrees to indemnify, and save others harmless against a certain engagement, is bound to secure them from incurring any expence, as it runs on at the time, which falls upon them by virtue of that engagement. *Sparkes v. Martindale*, T. 47 G. 3.

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BAIL-BOND.

To debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return-day, but before the sheriff was ruled to return the writ, and who accepted the money so paid by the defendant in full satisfaction and discharge of the bail-bond and fees, &c.; and that if any damage were afterwards incurred for default of defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c.; for it does not thereby appear that the sheriff's officer had either a legal or an equitable interest (even supposing the latter would have sufficed) in the bond at the time of the supposed satisfaction received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for money, but for a collateral act; and supposing that it could be so pleaded after the day stipulated for performance of the act. *Scholey and Domville v. Mearns*, H. 46 G. 3.

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BANKRUPT.

See INSOLVENT DEBTORS, No. 2.

MANDAMUS, No. 1.

1 It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves; and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his after acquired as well as present personal property and debts. *Kitchen v. Bartsch*, M. 46 G. 3.

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2 A bill of sale to a particular creditor of all the effects of a trader, in trust to satisfy his debt, and pay over the surplus (if any) to the trader, is an act of bankruptcy, and of no effect as a conveyance,

notwithstanding it was given by the trader when under arrest at the suit of the particular creditor for a just debt, and followed by an immediate change of possession. There was another writ out against the trader at the time, and he knew that he was in insolvent circumstances; but it did not appear that these facts were known to the particular creditor. *Newton, Assignee of Stelfox, a Bankrupt, v. Chantler*, H. 46 G. 3.

3 A creditor for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the traders in the hands of a third person, and recovered judgment in the mayor's court of London against the garnishee, who thereupon paid him the amount of the debt so attached; and afterwards a commission issued: held that this payment was not protected by the stat. 19 G. 2. c. 32, not being a payment made by the bankrupt in the usual and ordinary course of trade and dealing: and held that the assignees of such bankrupt, under a third commission issued against him, might sue for and recover back such payment, although the bankrupt who had obtained his certificate under his former commissions, had not paid 15s. in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors under the second commission respectively. *Hovil and others, Assignees of Wurdell, a Bankrupt, v. Browning*, H. 46 G. 3.

4 A trader indebted to the defendants, after a secret act of bankruptcy, gives them a new bill in lieu of their former claim, and deposits with them certain policies of insurance made on his account as collateral security. And after notice of a loss upon those policies, the policy broker, at the bankrupt's request, gives his own acceptance to the defendants, (which was afterwards paid,) in order to induce them to give up their lien on the policies; after which a commission of bankrupt having issued against the trader on the prior act of bankruptcy; held that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, which was the money of the broker, and not of the bankrupt; though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get the policies out of their hands. *Hovil and others, Assignees of Wurdell, a Bankrupt, v. Pack and another*, H. 46 G. 3.

5 Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experi-

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against the drawer; and that the want of it is not applied by proof of a noting for non-acceptance and a subsequent protest for non-payment. But whether or not the protest for non-payment be sufficient in such case, where the holder, after a refusal by the drawee to accept, presented it for payment when due, and was refused payment; at any rate the holder is bound to give notice to the drawer of the non-acceptance; without which the original payee, to whom the bill was returned, cannot recover against the drawer: and it is no excuse for not giving such notice that the drawer had no effects in the drawee's hands at the time when the bill was refused acceptance or afterwards, if he had some effects (to whatever amount) in the drawee's hands when the bill was drawn. *Orr and others, v. Maginnis*, E. 46 G. 3. 171

- 5 Whether or not the fact of putting a letter into the post-office containing notice of the dishonour of a bill to the drawer, to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer; at any rate, if a bill be accepted payable at A.'s, who is the acceptor's banker, the party taking such special acceptance, (which he is not bound to do,) thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. *Parker v. Gordon*, E. 46 G. 3. 183

- 6 The drawer of a bill of exchange which had been accepted, and was not refused payment by the acceptor till after the bankruptcy of the drawer, is discharged by his certificate; inasmuch as such debt is made proveable under his commission by the stat. 7 G. 1. c. 31. *Starey v. Barns*, T. 46 G. 3. 206

- 7 The vendee of goods having accepted a bill of exchange for the price of them, and becoming bankrupt before the bill became due, a guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee, acceptor being at least a prima facie warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however, it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Farbor*, H. 47 G. 3. 399

- 8 If the holder of a bill when due, after taking part payment from the acceptor,

agree to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder shall keep the original bill in his hands as a security; such agreement amounts to giving time and a new credit to the acceptor, and discharges the indorser, who was no party to the agreement; though the drawer might have had no effects in the hands of the acceptor. *Gould v. Robson*, T. 47 G. 3. 549

BILL OF SALE.

Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such, for want of reciting the certificate of registry therein, as required by stat. 26 Geo. 3. c. 60. s. 17, yet the mortgage may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 395

BILL OF SALE—fraudulent.

See BANKRUPT, No. 2.

BOND.

See INFANT, 1.

BRICKMAKER.

See BANKRUPT, No. 8.

BRIDGE.

By the common law, declared and defined by the stat. 22 H. 8. c. 5, and subsequent acts, where the inhabitants of a county are liable to the repair of a public bridge, they are liable also to repair to the extent of 300 feet of the highway at each end of the bridge: and if indicted for the non-repair thereof, they can only exonerate themselves by pleading specially that some other is bound by prescription or tenure to repair the same. *The King v. The Inhabitants of the West Riding of the County of York*, T. 46 G. 3. 274

BROKER.

See ASSUMPSIT, No. 2.

- 1 Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *McCombie v. Davies*, M. 46 G. 3. 11
- 2 It seems that a stock broker is liable to pay to the Chamberlain of London, for

the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 Ann. c. 16. s. 4, to be received by the Chamberlain from every *broker*. But at all events if the Chamberlain sue for such duty in the London Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a *bond* in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts; and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a *mandamus* to the commissioners to proceed therein; for under the statute of Anne their chamberlain is a *trustee* for the corporation; and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their chamberlain by the legislature: neither is the right of the chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that *all* of them had such interest. *The King v. The Commissioners of the London Court of Requests*, H. 46 G. 3. 139

BURGLAR—conviction of.

See CERTIFICATE TO EXEMPT, &c.

CANAL.

- 1 A canal act provided that the Canal Company should not be entitled, on purchasing lands for making a canal to any coal mines, &c. under the same; but that such mines should belong to the same persons as would have been entitled to them if the act had not been made; but it required the owners to give notice to the Company of their intention to work their mines within ten yards of the canal; and that the Company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held that the right of the owners to work within the ten yards was left as before the act, if, after notice given by them to the Company, the latter did not purchase out their rights: and that the canal being damaged by the nearer approach of the mine, after such notice and non-purchase, no action lay against the coal owners for such injury, which happened by the default of the Company in not purchasing. *The Company of proprietors of the Wyrley and Essington Canal Navigation v. Bradley and others*, E. 46 G. 3. 176
- 2 Aliter, where the canal act provided that in working the mines no injury should

be done to the canal. *Birmingham Canal Company v. Hawkesford*, cited. *ib.*
 3 And aliter where the house of one claiming under a grant from the owner of the soil was undermined by him. *The Earl of Lonsdale's case*, cited. *ib.*

CARRIER.

Where no lien exists at common law, it can only arise by contract with the particular party, either expressed or implied: it may be implied either from previous dealings, between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealings. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage-price of the particular goods, there ought to be very strong evidence of a general usage for such a lien, to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract: and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendants and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, and not opposed by other evidence, the Court refused to grant a new trial. *Rushforth and others, Assignees of Rushforth, v. Hadfield and others*, H. 46 G. 3. 108

CERTIFICATE.

See SETTLEMENT by Certificate.

CERTIFICATE TO EXEMPT FROM PARISH OFFICES.

A certificate granted by a Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assigns from "all and all manner of parish and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted: to which office he was appointed at the court leet of the manor co-extensive with such township. *Moseley, Bart. v. Stonehouse*, H. 46 G. 3. 86

CHAPLAIN.

See CURATE.

CHARITABLE USES.

Where the founder of a hospital directed that if, in making up the accounts of the wardens biennially going out of office,

any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint, within certain times; and power to correct or remove the master for certain cases, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of interpreting the statutes in case of any doubt: and the founder also delegated to the dean and chapter of York power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: held that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by the stat. 43 Eliz. c. 4; and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. *Kirkby Ravensworth Hospital case*, H. 47 G. 3. 390

CHARTER-PARTY.

See **FREIGHT**, 1.

CHURCHWARDEN.

See **ELECTION**, No. 1.

CIVILIANS.

See **MANDAMUS**, 8.

COAL MINE.

See **GRANT**.

- 1 A canal act provided that the canal company should not be entitled, on purchasing lands for making a canal, to any coal-mines, &c. under the same, but that such mines should belong to the same persons as would have been entitled to them if the act had not been made: but it required the owners to give notice to the company of their intention to work their mines within ten yards of the canal: and that the company might inspect the mines, and might stop the further working of them, paying compensation to the owners: held, that the right of the owners to work within the ten yards was left as before the act, if after notice given by them to the company the latter did not purchase out their rights: and that the canal being damaged by the nearer approach of the mine after such notice and non-purchase, no action lay against the coal-owner for such injury, which happened by the default of the company in not purchasing. *The Company of Proprietors of the Wryley and Exington Canal Navigation v. Bradley and others*, E. 46 G. 3. 176

- 2 Aliter, where the canal act provided that in working the mines no injury should

be done to the canal. *Birmingham Canal Company v. Howkesford*, cited. *ib.*
 3. And aliter, where the house of one claiming under a grant from the owner of the soil was undermined. *Earl of Lonsdale's case*, cited. *ib.*

COLONIAL PRODUCE.

Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one of the *West India* islands, with liberty to exchange it at another, (which would have been legal,) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. *Lubbock v. Potts*, T. 46 G. 3. 212

COMMISSIONERS under private Acts, their Liability for Costs.

See **COSTS**, 5. **INDICTMENT**, 2, 3, 4. **JURISDICTION**, 2, 3.

COMMITMENT—BY PAROL.

The stat. 13-G. 3. c. 80, gives a penalty in case of killing game on a Sunday, and directs that it shall be forthwith paid on conviction, and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held, that such order to detain in custody until the return of the warrant of distress may be by parol. *Still v. Walls and Harris*, T. 46 G. 3. 249

COMMON.

- 1 A custom that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common; and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences as

such customary tenements. *Wilson v. Willes*, *Knt. H.* 46 G. 3. 62

- 2 The owner of a tenement may have two distinct rights of common for his cattle levant and couchant upon such tenement, upon different wastes, in different manors, under several lords; and therefore an allotment under one inclosure act, in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for inclosing the other waste. *Semle aliter*; if the different wastes had appeared to have been originally holden under the same lord. *Hollingshead v. Walton*, *T.* 46 G. 3. 228

COMMONER.

If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 Eliz. c. 5. s. 2, that the damage did not amount to 40s. the plaintiff shall have no more costs; for the interest or title of the land does not necessarily come in question in such action, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act. *Edmonson v. Edmonson*, *H.* 47 G. 3. 422

COMPOUNDING PENALTIES.

- 1 Money paid by A. to B., in order to compromise a *qui tam* action of usury brought by B. against A., on the ground of an usurious transaction between the latter and one E., may be recovered back in an action by A. for money had and received. For the prohibition and penalties of the stat. 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute, and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in *pari delicto*, nor is particeps criminis with such compounding informer or plaintiff. *Williams v. Hedley*, *E.* 47 G. 3. 461
- 2 And such recovery may be had although E.'s assignees had before recovered from B. the money so received by him, as money received to their use, (the money paid by way of composition being at the time stated to be E.'s money;) there being no evidence at the trial of this cause to shew that A. the present plaintiff was privy to that suit. *ib.*

CONDITION PRECEDENT.

See COVENANT, 7.

CONSCIENCE, COURT OF.

See LONDON COURT OF CONSCIENCE.

CONSTABLE.

A certificate granted by the Judge at the

assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of parish and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted; to which office he was appointed at the court leet of the manor co-extensive with such township. *Messley, Bart. v. Stonehouse*, *H.* 46 G. 3. 86

CONTRACT.

See WARRANTY, 2.

CONVICTION.

- 1 Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a conviction for such offences returned by certiorari into B. R., it ought to appear on the face of the evidence stated in such conviction; that the prosecution was in time: and if the witness be only stated to have mentioned the month in which the offence was committed, omitting the year, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having convicted the defendant. *Rex v. Woodcock*, *H.* 46 G. 3. 73
- 2 A conviction on the malt-act, 42 G. 3. s. 38. s. 30, dated 4th of June 1805, stated that on the 29th of May 1805, R. P. informeth us (three justices) that at the time of the committing the offence aforementioned the defendant was a maltster, and within three months now last past, viz. on 12th of May now last past, at W. &c. did wet certain grain of him the defendant, then and there making into malt in a certain stage of operation, &c. and thereupon afterwards on the 4th of June, (no year mentioned) at W. the defendant having been duly summoned, now here appears before us, &c. and having heard the information read, is asked, &c. and thereupon the defendant denieth, &c.; whereupon we do now here proceed to examine, &c.; and on the day and year last aforesaid at W. &c., J. F. officer of excise, now here comes before us, &c. and deposeth, &c. in the premises, that he surveyed the malt-house of the defendant at W. aforesaid, on the said 12th of May, and found a floor of malt in operation, very wet, &c. and the defendant is now here again called upon by us, &c. for his further defence, but no other evidence is now here produced, &c., whereupon it is adjudged, &c. (Stated to be signed and sealed on this 4th of June 1805.) Held, 1st, That the offence being charged to be committed on the 12th of May now last past, the antecedent date being the 29th

of *May 1805*, when the information was exhibited, and the conviction being dated the 4th of *June 1805*, and it being also alleged that the offence was committed *within three months now last past*; it does appear that the offence was committed on the 12th of *May 1805*, and, not in 1804. The words *now last past*, after the 12th of *May*, referring to the day of the month and not to the month; and therefore the information was in time.

2dly, The witness swearing to the offence being committed on "the said 12th of *May*, sufficiently refers to the 12th of *May 1805*, the day charged in the information, so as to shew that the offence was committed within the three months: for it is the relation of the evidence *by the magistrates*, who also state that the witness deposed in the premises.

3dly, By the statement of the proceedings in the conviction, it appears to have been all one continuing transaction, from the appearance of the defendant after the summons to the close of the conviction: and this appears both from the antecedent dates of *May 1805*, and the date of the conviction, to have been on the 4th of *June 1805*; because the defendant is stated to have been afterwards (i. e. after the information exhibited) summoned, and to have appeared on the 4th of *June*, and the conviction was signed and sealed on the 4th of *June 1805*. And it thereby also appears, that the evidence was given in the defendant's presence, as his departure pending the continuance of the transaction will not be presumed. And it thereby also appears that the conviction took place on the 4th of *June 1805*.

4thly, The witness deposing that he found "a floor of *malt* in operation," very wet, &c. being the language of the witness and intelligible to a common intent, sufficiently proves the offence charged of wetting *corn or grain making into malt, in a state of operation*.

5thly, The witness, an excise officer, stating in language appropriate to his employment, that he surveyed the *malthouse* of the defendant on the 12th of *May*, and there found a floor of malt in operation, &c. is prima facie evidence that the defendant was at that time a *malster*; for otherwise it could not be properly called *his malthouse*, nor would the officer have had authority to survey it; as by the excise laws a party must enter his malthouse before the officer can survey it. *The King v. Crisp*, E. 46 G. 3. 186

- 3 The st. 42 G. 3. c. 119, against illegal lotteries, directing the penalty to be distributed 1-3d to the king, 1-3d to the informer, and 1-3d to the person apprehending or securing the offender; a conviction directing the penalty to be distributed as the law directs, without ascertaining to whom the last third is to be paid, (the person being uncertain), is bad. *The King v. Seale*, T. 47 G. 3. 546

4 But it need not appear that there was in fact any illegal lottery, if it be shewn that the money was taken for that purpose. *ib.*

- 5 A conviction stated to be made by justices of the peace, &c. at the public office in *Great Marlborough street*, &c. does not legally denote that it was made by one of the police magistrates under the stat. 42 Geo. 3. c. 76, &c. *ib.*

COPYHOLD.

1 *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no control, and by which he let in *B.*'s remainder,) and takes a new copy for the lives of himself, *C.*, and *B.*, successive; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant: held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right against him; or might have disabled *B.*, if he had continued out of possession, from recovering in ejectment. *Doe v. Reade*, E. 47 G. 3. 450

2 Where three lives in a copy are to take successive, and a father, the sole purchaser, put in the lives of himself and his two sons, in general the sons shall take beneficially, unless it appear by any concurrent act of the father that he did not so intend it; as by taking at the same court a licence from the lord to himself and his mother (who had her free bench) to lease for 70 years. In which case, if the father afterwards lease by way of mortgage pursuant to such licence, and there be a custom in the manor for the first taker to dispose of the estate as against the other lives, such custom may operate to devert the legal estate of the lives in reversion, and give it to the lessee; or if that were doubtful; or if the licence of the lord might be construed to extend only to the first taker of the new copy jointly with his mother, and the first taker alone executed such licence after her death; yet a court of equity (even if the surviving life, (the son,) succeeded at law on his strict legal title) would make the son the surviving life, convey to his father's lessee and pay all the costs in law and equity. *Swift, d. Farr, v. Davis*, H. 39 G. 3. MS. 450, n.

COPYHOLD AND CUSTOMARY ESTATES.

See Custom, No. 1.

1 The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though afterwards admitted, cannot recover in ejectment; for his admittance has no relation to the last

- legal surrender: but the legal title remains in the heir of the surrenderor. Though if the first devisee had been considered to be admitted in construction of the law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so;) or if the admittance of the first devisee's heir could be considered as an admittance, by relation back, of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide. *Doe d. Vernon v. Vernon*, M. 46 G. 3. 12
2. There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 Car. 2. c. 3. s. 12, and 14 G. 2. c. 20. s. 9, appropriating estates *pur autre vie* where there is no special occupant, do not extend to copyholds. And one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord. *Zouch, d. Forse v. Forse*, H. 46 G. 3. 91
- 3 One may hold the *prima tonsura* of land as *copyhold*, and another may have the soil and every other beneficial enjoyment of it as *freehold*. And ancient admissions of the copyholder, and those under whom he claims the land, by the description of "*tres acras prati*," may be construed only to carry the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the aftercrop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes, which was in his own wrong. *Stammers v. Dixon*, H. 46 G. 3. 97
- 4 The *freehold* of an estate parcel of a manor, and demisable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod, according to the custom of the manor, by the accustomed rent, suit of court, customs and other services, is in the *lord*, and not in the *tenant*; though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of *copyhold* in a will; the intention to pass it under that description being apparent. *Doe d. Cook and Wife v. Danvers*, H. 46 G. 3. 142
- 5 Such customary estate is not within the

5th section of the statute of frauds, 29 Car. 2. c. 3, so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section, as a declaration of trust, requiring to be proved by a writing *signed by the party*; which applies only to cases where the legal and equitable estates are separated; or by a will in writing; which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party, though without any signature or attestation, which was established as her will by the ecclesiastical court granting probate thereof, and is a good will under the statute of wills; the estate having been surrendered to the use of her last will in writing. *ib.*

6 Such estates pass, not by the will alone, but by the will and surrender taken together. And the entry of the devisee, after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry, as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord. Nor was such entry barred by the statute of limitations, 21 Jac. 1. c. 16, having been made within 20 years, after the old lease expired; the devisee not being bound to enter before, as for a condition broken, by the non-payment to her of rent. *ib.*

7 Where the tenants of a manor, formerly belonging to a monastery, holding by *border service*, and the defence of *Tynemouth Castle*, under copy of court roll, and whose estates passed by *surrender and admittance*, shewed in evidence by surrenders as far back as they existed in writing; by admissions from the 17th Eliz. to the 14th Car. 1; by Exchequer decrees between the lords and tenants in the times of Eliz. and Jac. 1; and by an inquisition of the jury at the court-baron of the lord in the 2d of Jac. 2; that they were *copyholders of inheritance*, with *finis certain*, holding according to the custom of husbandry of the manor, (or according to the custom of the manor generally,) without stating them to hold at the will of the lord: admitting this evidence to outweigh proof of minister's accounts in the 30th and 31st Hen. 8, a grant of the manor from the

crown in the 9th Car. 1, including these estates under the name of *tenements of husbandry*; subsequent mesne conveyances reserving the coal-mines, &c. in certain districts; and admissions from 1663 to 1777 (including admissions of the several tenants to the estate immediately in question;) in all which they were stated to hold *at the will of the lord*, as well as *according to the custom of husbandry of the manor*, &c.: yet as there was evidence for more than a century past, that the lord had leased the coal and lime-stones under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants, had taken the coal and lime-stones; held that such *acts of ownership* explained the nature of the tenure, *according to the custom of husbandry of the manor*, &c. and shewed, in aid of the other evidence, that the *freehold* was in the lord, and not in the tenants. And at any rate, the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him. *Brown v. Rawlins*, T. 46 G. 3. 195

CORN growing.

See *DEVIAR*, 10.

CORPORATION.

- 1 An ejectment against the bailiffs protem-pore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs: for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman*, H. 47 G. 3. 393
- 2 A charter having granted that upon the death or amotion of a principal burgess (*who is appointed to hold for life*) it should be lawful for the mayor and the remaining principal burgesses, *within eight days next following*, to elect another: the eight days after a vacancy having slipped without an election, a mandamus was granted upon the stat. 11 G. 1. c. 4. s. 2, to make an election. *The King v. Mayor, &c. of Thetford*, H. 47 G. 3. 412
- 3 If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon,

but before it is completed, an election made after his departure is void. *The King v. Buller*, E. 47 G. 3. 466

- 4 Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* declared on were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken on that fact. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 510
- 5 Where the *whola* corporation are summoned for a particular purpose, (e. g. to receive the resignation of a common council man) a *select body*, who are *all present and consenting*, may at the same meeting, without any particular summons to them for that purpose in their select capacity, proceed to an election of a common council man in the place of the other resigned; the power of election being in such select body, and the charter not requiring any previous summons. *The King v. Theodorick*, T. 47 G. 3. 534

COSTS.

- 1 No costs are allowed on the statute 3 H. 7. c. 10, where a writ of error is nonprossed before the transcript of the record by the Clerk of the Errors of *B. R.* *Salt, one, &c. v. Richards*, H. 46 G. 3. 58
- 2 Where to trespass at *A.*, and throwing down, burning and totally destroying the plaintiff's *hedge, there then erected*, &c. whereby, &c. the defendant pleads the general issue, and justifies as to the throwing down the hedge, because it was erected on a common over which he prescribes for right of common; and issue is taken on such right, which is found for him, and a verdict for the plaintiff, with 20s. damages on the general issue; the facts stated in the special plea, and found, cannot be taken into consideration to shew that the title to the freehold could not come in question on the declaration: and as on the declaration the freehold might have come in issue, and the Judge did not certify, the plaintiff is entitled to no more costs than damages. *Stead v. Gamble*, H. 46 G. 3. 153
- 3 Where two several petitions signed by different persons were presented to the House of Commons against the return of members to serve in parliament for *East Grinstead*: which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious; the costs cannot be taxed jointly under the st. 28 G. 3. c. 63; and

therefore the Speaker having first certified a joint taxation of costs for a certain sum against all the petitioners; and having afterwards by an amended certificate apportioned how much of the first-mentioned sum taxed was incurred by the sitting members in opposing the two petitions *jointly*, and how much was incurred by them in opposing each *separately*; the plaintiffs by the advice of the Court submitted to enter nonsuits as well in two several actions prosecuted against the respective petitioners for the *separate* costs certified against each, as also in a joint action against all to recover the taxation certified against them all *jointly*. *Strashey, Bart. v. Turley, and others*, T. 46 G. 3. 238

4 If there be a certificate against any more costs than damages upon the stat. 43 Eliz. c. 6. s. 2, the plaintiff shall not have the costs of the double pleas on which all the issues were found for him; although the Judge have not certified under the stat. 4 Ann. c. 16. s. 5, that the defendant had probable cause to plead the several special matters; that section, which says that "if a verdict be found on any issue for the plaintiff costs shall be given, &c. " unless the Judge who tried the said issue shall certify," &c. only applying to cases where one at least of the special pleas is found for the defendant, which would entitle him to the general costs. *Richmond v. Johnson, Clerk*, T. 46 G. 3. 272

5 Though a local regulating act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer;" it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them, however they may afterwards recoup themselves out of the fund in the treasurer's hands. *The King v. Kingston and Others*, M. 47 G. 3. 313

6 And they may be indicted for non-payment of such costs. *ib.*

7 Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanning his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 411

8 If in an action on the case for an injury done to the plaintiff's right of common by digging turves there, the Judge certify under the stat. 43 Eliz. c. 6. s. 2, that the damages did not amount to 40s., the plaintiff shall have no more costs; for the interest or title of the land does not necessarily come in question in such ac-

tion, and did not in fact in this case, where the action was brought against another commoner for a mere wrongful act. *Edmonson v. Edmonson*, H. 47 G. 3. 422

9 Though the stat. 16 & 17 Car. 2. c. 8. s. 3, provides that no execution in ejectment shall be stayed unless the plaintiff in the writ of error shall be bound for the costs in case judgment be affirmed, &c.; yet by reasonable construction it is sufficient if he procure proper sureties to enter into the recognizance of bail; but these may be examined as to their sufficiency, which the plaintiff in error himself cannot be. The practice is to take the recognizance in double the improved rent, and the single costs of the ejectment. *Keene v. Deardon*, E. 47 G. 3. 424

10 The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause: notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. *Howell v. Harding*, E. 47 G. 3. 454

11 Where a party obtains leave, by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed. *Taylor v. The Royal Exchange Assurance Company*, E. 47 G. 3. 468

COUNTY.

See EVIDENCE, No. 1.

COURTS.

See LONDON COURT OF CONSCIENCE.

The stat. 2 G. 2. c. 22, and other acts relieving insolvent debtors charged in execution on process out of any of the courts of law extend to inferior as well as superior jurisdictions. *Rez v. Bailiffs of Ipswich*, M. 46 G. 3. 47

COURT OF REQUESTS, &c.

1 The court of requests act for Southwark, &c. enacts, that "if in any action, &c. for recovery of any debt, sued against any person (within the jurisdiction) in any of the king's courts at Westminster, &c. it shall appear to the Judge, &c. that the debt to be recovered by the plaintiff doth not amount to 40s. &c." the plaintiff shall pay the defendant costs, &c.: held that where the plaintiff's witnesses proved that the debt, which was originally above, was reduced below, 40s. by part payment before the action brought, the case was within the statute. *Clark v. Askew*, M. 47 G. 3. 307

2 The same point was ruled on the London court of requests act, 39 & 40 G. 3. c. 104. *Horne v. Hughes*, T. 47 G. 3. 447

- 3 In *McCollam v. Car*, 1 Bos. & Pull. 223. Ld. C. J. Eyre considered that no case would be within the *Middlesex* court of conscience act 23 G. 2. c. 33, where the original debt being above 40s. was reduced below that sum by a balance of accounts. Sed quere; for the words of that act are peremptory, that in case the jury shall find the damages for the plaintiff under 40s., unless the Judge shall certify, &c. the defendant shall recover double costs. *Clark v. Askew*, M. 47 G. 3. 308
- 4 The *London* court of requests act 39 & 40 G. 3. c. 104. s. 12, provides, that if any action be commenced out of that court for any debt not exceeding 5l. (within the jurisdiction) the plaintiff shall not, by reason of a verdict for him, or otherwise, be entitled to costs, &c.: held that after judgment by default, and the damages assessed upon a writ of inquiry, the defendant might come into court and move to stay proceedings on payment of the damages assessed, without costs. *Dunster v. Day*, H. 47 G. 3. 398
- 5 A market gardener who rented a stand with a shed over it in *Fleet* market at an annual rent, which he occupied three times a week on market days till 10 o'clock in the morning; after which, and on all other days, it was occupied by others; does not keep a stand within the meaning of the *London* court of requests act 39 & 40 G. 3. c. 104, so as to be privileged to be sued there for a debt under 5l. *Grey v. Cook*, E. 47 G. 3. 442
- 6 If a debt be reduced by part payment below 5l. before the action brought, the case is within the *London* court of requests act 39 & 40 G. 3. c. 104. *Horne v. Hughes*, E. 47 G. 3. 447

COVENANT.

See GRANT.

- 1 The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself, whilst the same should remain there, paying half the expenses of repair." The words whilst, &c. reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump. *Rhodes v. Bullard*, H. 46 G. 3. 60
- 2 An action of covenant does not lie upon the stat. 3 W. & M. c. 14, against the devisee of land to recover damages for a breach of covenant made by the deviser; but the remedy thereby given is confined to cases where debt lies. *Wilson v. Kaubley*, H. 46 G. 3. 66
- 3 One in consideration of 5l. 8s. in nature of a fine, and of a yearly rent of 6s. 9d., demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of 21 years at the like yearly rent, with all covenants, grants, and articles as in that indenture were contained;" held that this covenant was satisfied by the tender of a new lease for 21 years containing all the former covenants except the covenant for future renewal. And held that an averment, that the covenant for renewal in the indenture declared on corresponded with various other leases, before then successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that all the former leases contained the same covenant for renewal. *Iggulden v. May*, H. 46 G. 3. 114
- 4 Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendant by assignment thereof. *Turner v. Richardson and another, Assignees of Barber, a Bankrupt*, E. 46 G. 3. 159
- 5 By indenture, between A. and B. and C., dissolving their partnership as rope-makers, A. and B. covenanted to allow C. during his life 2s. on every cwt. of cordage which they should make on the recommendation of C. for any of his friends and connexions, and whose debts should turn out to be good; and that A. and B. should stand the risk of such debts incurred, but should not be compelled to furnish goods to any of C.'s connexions, whom they should be disinclined to trust. And C. covenanted not to carry on the business of a rope-maker during his life (except on government contracts); and that all debts contracted or to be contracted in his or their names, pursuant to the indenture, should be the exclusive property of A. and B., and that C. should, during his life, exclusively employ A. and B., and no other person, to make all the cordage

ordered of him, by or for his friends and connexions, *on the terms aforesaid*, and *should not employ any other person to make any cordage on any pretence whatsoever* : held

1st, That the covenant by C. to employ A. and B. exclusively to make cordage for his friends, and not to employ any other, &c. ; A. & B. not being obliged to work for any other than such as they chose to trust, was not illegal and void, as being in restraint of trade without adequate consideration : for the whole indenture must be construed together, according to the apparent reasonable intent of the parties ; and the general object being only to appropriate to A. and B. so much of C.'s private trade as they chose to give his friends credit for, so much only was covenanted to be transferred, and C. was still at liberty to work for any of his friends who were refused to be trusted by A. and B. : by which construction the restraint of C. was only co-extensive, as in reason it could only be intended to be, with the benefit to A. and B. ; and therefore the restraint on C. could be no prejudice to public trade.

2dly, That breaches assigned generally against C. for having made cordage for *divers persons* other than for government, and for employing other persons than A. and B. to make cordage for his friends, &c. were well assigned, though no particular persons were named, nor the quantities or kinds of cordage mentioned, &c. such facts lying more particularly within C.'s knowledge. *Gale v. Reed*, M. 47 G. 3. 330

6 Though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by stat. 26 G. 3. c. 60. s. 17 ; yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the re-payment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 395

7 By a charter-party of affreightment the owner of the ship covenanted to take on board at London the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another cargo, and (wind and weather permitting) proceed therewith to his port of discharge in G. B. and there deliver the same to the freighter, and end the said voyage. In consideration whereof the freighter covenanted to pay 670*l.* per month for freight during the said intended voyage to M. V., and back to her port of discharge ; such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when she should have finally discharged the whole ; and also to pay two thirds of all pilotage and port-charges during the said voyage ; such freight, pilotage, and port-

charges to be paid on the arrival and discharge of the ship at her destined port in G. B.—

In covenant by the owner for an alleged breach in non-payment of freight, pilotage, and port-charges, it is not enough to shew that the ship after having taken in a cargo in G. B. and proceeded part way on the voyage, but before her arrival at M. V., was, without the default of the owner or crew, wrongfully seized and brought back to London and there detained for some time, till she was restored to the owner ; in consequence of which she required repairs, which were done with all necessary dispatch, and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose, and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c. but that the freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage ; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (qua freight,) pilotage and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in G. B., and therefore such arrival and discharge (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions ; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage : and the performance of the condition which was to entitle the owner to freight, &c. would still have been contingent, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken ; and which he has the immediate power of doing at the time, in order to entitle himself to a concurrent duty from another, is by a refusal of that other to accept of such tender, dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty. *Smith v. Wilson*, T. 47 G. 3. 488

- 8 The devise of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant as assignee of all the estate, right, title, and interest, of the original covenantor. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 510
- 9 Where a corporation declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* declared on were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse to them by such name was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, upon an issue taken upon that fact. *id.*

CROPS growing.

See DEVISE, 10.

CROSS-EXAMINATION.

See EVIDENCE, No. 2.

CURATE, OR CHAPLAIN.

- 1 In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to licence a curate or chaplain only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate or chaplain of the church of *P.*; without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment, the Court quashed the writ. *The King v. The Bishop of Oxford*, E. 46 G. 3. 163
- 2 A chapel in the township of *P.* was endowed in 1423, by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is recited, as if a matter of doubt whether the curate were entitled to the small tithes or to a modus in lieu of tithes; the decision of which is left untouched by the act. In 1801, upon a vacancy the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and to

the money payment of 40*l.* 8*s.* 2*d.* annually payable out of the lands and hereditaments in *P.* in right of the said curacy, together with surplice fees and all other profits, privileges and appurtenances to the same belonging and of right payable; that the inhabitants considering that sum not sufficient for the proper support of the curate had voluntarily agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a proviso that it shall not in any respect alter the money-payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been TIME IMMEMORIAL charged in right of the said church." Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved on the crown by stat. 31 Eliz. c. 6. s. 5, whose presentee had been licensed by the ordinary, a mandamus to the ordinary to licence another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King v. The Bishop of Oxford*, T. 46 G. 3. 279

CUSTODY.

See COMMITMENT BY PAROL.

CUSTOM.

- 1 A custom that all the customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially by themselves, their tenants and occupiers, dug, taken, and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common: and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of, and for the hedges and fences of such customary tenements. *Wilson v. Willes*, Knt. H. 46 G. 3. 62

CUSTOMARY ESTATE.

See COPYHOLD, &c.

DAMAGE.

See EVIDENCE, 13, or SLANDER, 1. VERDICT, 1.

DATES WITH REFERENCE.

See CONVICTION, No. 2.

DEBT.

See BANKRUPT, 12, or LANDLORD AND TENANT, 11. INSOLVENT DEBTOR, 5.

An action of covenant does not lie upon the stat. 3 W. & M. c. 14, against the devisee of land to recover damages for a breach of covenant made by the deviser; but the remedy thereby given is confined to cases where *debt* lies. *Wilson v. Knubley*, H. 46 G. 3. 66

DEED.

See AWARD, No. 2.

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was properly stamped in proportion to the apprentice fee of 12*l.* received by the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period: and the judgment of the justices was confirmed in *B. R. The King v. The Inhabitants of Long Buckby*, M. 46 G. 3. 29

DELIVERY OF GOODS.

See WEST INDIA DOCK COMPANY, 1.

DEPOSITIONS.

Where a party obtains leave by consent, to examine witnesses abroad on depositions, he is not entitled to be allowed the expence of taking the depositions in the taxation of costs, though he succeed. *Taylor v. The Royal Exchange Assurance Company*, E. 47 G. 3. 468

DESCENT CAST.

The entry of a devisee of copyhold or customary estate after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment,) was not tolled by a descent cast on the defendant from his father; who as heir at law of the testatrix had been admitted in 1782, and had received rent to the time of his death in 1791, after which the defendant was admitted and received the rent: the doctrine of descent cast not applying to cases where the party has no remedy but by entry, as in the case of a devisee: nor to copyhold or customary estates where

the freehold is in the lord. *Doe d. Cook and Wife v. Danvers*, H. 46 G. 3. 142

DESCRIPTION OF LANDS.

See DEVISE, 7. 9.

DETAINDER IN CUSTODY.

See COMMITMENT BY PAROL.

DEVISE.

- 1 Under a devise to the testator's widow of "200*l.* per annum for life in addition to her jointure," (which jointure it appeared was secured by a term out of his real estates) "his debts being previously paid: and to his younger children "600*l.* each, to be paid respectively at "21;" after which the testator appointed *A., B., and C., as trustees of inheritance for the execution thereof:*" held by three Judges, that the trustees thereby took a fee in the testator's lands; against one Judge, who thought the meaning of those words too uncertain to disinherit the heir at law. *Trent v. Hanning*, H. 46 G. 3. 52
- 2 The word *estate* will carry a fee in a will, if not retained by other words; and held that it was not restrained in a devise of "all my estate, lands, &c. known and "called by the name of the *Coal yard* in "the parish of *St. Giles, London.*" *Rosdem. Child and Wife v. Wright*, H. 46 G. 3. 124
- 3 One devised a leasehold for a long term after the decease, &c. of *S. K.* to *T. C.* for life, remainder to his child or children by any woman whom he should marry, and his or their executors, &c. for ever; upon condition that *in case the said T. C. shall die an infant, unmarried and without issues*, the premises to go over to his father *W. C.* and his three other children, share and share alike, and their heirs, executors, &c. Held that the devise over depended upon *one contingency*, viz. *T. C.'s dying an infant, attended with two qualifications*, viz. his dying *without leaving a wife surviving him, or dying childless*; and that the devise over could only take effect in case *T. C.* died in his minority, leaving neither wife nor child: and here it failed, *T. C.* having attained 21, and married before his death. *Doe d. Everett and others, v. Cooke*, H. 46 G. 3. 128
- 4 Though the devise of a term for life, with a contingent remainder over, will in general only entitle the first taker to a life estate, if the remainder over do not take effect; and the residue of the term will go to the personal representative of the testator; yet the testator's intent appearing to be to dispose of the whole from his executors; held that the lessors of the plaintiff, who claimed under his will, were entitled to recover after the death of *T. C.* without issue. 13.

- 5 An estate, whether strictly copyhold to all purposes, or customary estate the freehold of which is in the lord, may well pass under the description of copyhold in a will; the intention to pass it under that description being apparent. *Doe d. Cook and Wife v. Danvers*, H. 46 G. 3. 142
- 6 A devise to one by the name of *Mary*, whose christian name was *Elizabeth*, is good; if the jury find from the circumstances that she was the person meant to be designated. *ib.*
- 7 One having an only child *Rebecca*, who was married and had three children, *Thomas*, *Rebecca*, and *Ann*, devised his copyhold to *Rebecca* his daughter for life, remainder to his grand-daughter *Rebecca*, for life, remainder to trustees to preserve contingent remainders, remainder to the use of the issue of the body of his grand-daughter *Rebecca*, in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and in default of appointment to the use of all and every the children of his said grand-daughter and their heirs, as tenants in common; and in default of such issue, to the use of all and every the other children of his daughter *Rebecca* and their heirs, as tenants in common, &c.; and in default of such issue, to his own right heirs. Held that upon the death of the testator's daughter and of his grand-daughter *Rebecca*, without any appointment, an only child of the latter took an absolute fee; on whose death, under age and unmarried, the premises descended to her uncle *Thomas* as her heir at law; and that the subsequent limitations to the other children of the testator's daughter *Rebecca* did not take effect. For the devise to the children of his grand-daughter *Rebecca* and their heirs *prima facie* carries a fee; and the subsequent words, "In default of such issue," refers to her children, and not to their heirs; though the limitation over in default of such issue be made to those who might take as heirs to the children of *Rebecca* the grand-daughter. And the intention of the deviser that her children, if any, should take a fee is further evinced by this, that the limitation to them and their heirs is in default of appointment, under a power given her to appoint "to the use of the issue of her body in such manner and form (as well as in such parts, shares, and portions) as she should direct;" under which words "*manner and form*" she might have appointed to all or any of her children *in fee*, and was not restrained to appoint to them *in tail only*; which limitation, in default of appointment, is a substitution for the execution of the power. *The King v. The Marquis of Stafford and others*, T. 46 G. 3. 244
- 8 One having purchased of *A.* the manor and certain lands of and in *Hampreston* in the counties of *Dorset* and *Hants*, and having settled a rentcharge on his wife out of his manor of *Hampreston* in the county of *Dorset*, and all other his lands, &c. in *Hampreston* aforesaid, which he bought of *A.*; and having afterwards purchased of other persons other lands in *Hampreston* in *Hants*, (which were near to another estate of his called *Uddens* in *Dorset*;) by his will, reciting and confirming the settlement, devised to trustees, "the said manor, &c. and other hereditaments of and in *Hampreston* aforesaid, and all other the manors, lands, farms, &c. and other hereditaments in or near *Uddens*, aforesaid, or elsewhere in the said county of *Dorset*," to trustees for different uses; amongst others, giving his wife an additional rentcharge, payable out of the manors and hereditaments in the said county of *Dorset*; and as to all and singular the said manors and other hereditaments in the said county of *Dorset*, with other appurtenances, &c. charged as aforesaid, he devised the same to the first and other sons of his body, remainder to his daughters in strict settlement; and if all but one of his daughters died without issue, "then as to the entirety of the said manors and other hereditaments," to the daughters of his remaining daughter in tail, &c.; remainder to the lessor of the plaintiff, his nephew, and heir at law; remainder to his sons and daughters in strict settlement; remainders over to other junior nephews in like manner: with power to the trustees to raise money on the security "of the manors and other hereditaments in the said county of *Dorset*," and also to sell the devised lands, except such as were situate at *Uddens*, or *Hampreston* aforesaid, and to purchase other lands in fee within the said "manor of *Hampreston*, in the said county of *Dorset*," &c. The deviser, by a subsequent codicil, in which he speaks of the prior devise of his *Dorsetshire* estate, revoked the devise to the lessor of the plaintiff. Held that the *Hampreston* lands lying in *Hants*, and not purchased of *A.*; though situated within and surrounded by the general ambit of *Dorsetshire*, and also near *Uddens*, and holden together with, and as part of, a *Dorsetshire* farm, did not pass by the will; which was confined in express terms to the manor and lands in *Hampreston*, purchased of *A.* (by force of the words "said manor, &c. and hereditaments aforesaid," referring to the recital of the settlement,) or which lay in the county of *Dorset*, (by the addition of the latter words; which would not have been necessary if the deviser had meant to pass all his lands near *Uddens*, in whatever county situated.) For though where a thing is certainly expressed at first, the addition of another certain description may be rejected as superfluous; yet it is otherwise where the thing at first described is uncertain; as here

lands, &c. near Uddens. *Doe v. Great-head*, M. 47 G. 3. 335

9 One seised in fee, having only one daughter *A.* married to *N. B.*, and two grandsons *W. T. B.* and *M. B.* devised, "as for my worldly and temporal estates, &c. I give to *N. B.* 1s.; and devised that he shall not come upon my premises or hereditaments on any account whatsoever. Then after giving a legacy to his grandson *M. B.*, he devised to his daughter 20l. a year out of the profits of his estate or lands at Eaton;" and then devised to his grandson *W. T. B.* "all his messuage and dwelling-house situate at Eaton aforesaid, with all hereditaments, &c. thereunto belonging, &c.; and that *W. T. B.* when 21 shall enter upon and enjoy the abovementioned estates, situate at Eaton aforesaid; but that if he should leave his profession, all his right and title to the estate devised should devolve and descend to his brother, *M. B.*: held that in order to effectuate the intention of the deviser to exclude at all events, his son-in-law *N. B.* from coming upon his premises, &c. (which he would otherwise be entitled to do as tenant by the curtesy, if his son *W. T. B.* died before his mother); *W. T. B.* took a fee. Aided too, as that construction was, by the introductory words as to his worldly estate; by giving *N. B.* 1s.; by the annuity for life to his daughter, payable out of the same estate; and from the direction for the estate to descend and devolve to *M. B.* if his elder brother *W. T. B.* should leave his profession; (in which event *M. B.* would only have taken pur autre vie.) But held that the annuity devised to his daughter *A.* out of the profits of the estate, being no charge upon the devisee, or upon the estate given to him, would not have passed the fee to *W. T. B.*: nor would the word estate, as here used in the devise to him; being by reference restricted to the antecedent words. *Doe v. Clayton*, M. 47 G. 3. 356

10 *A.* having an estate in the county of *Monmouth*, of which he was seised in fee, in possession; and another estate in the county of *Radnor*, of which he was also seised in fee, subject to the uses of his marriage settlement; (by which he covenanted to convey to the use of himself and his wife for life; remainder to his first and other sons in tail;) which left him in equity a disposing power over the reversion only: both which estates had formerly belonged to an uncle, and came to him, the one by descent, the other by purchase from another coheir of his uncle; by his will, misreciting the estate of which he was seised in fee in possession to be in the county of *Radnor* instead of *Monmouth*; and misreciting his disposable reversion to be in the county of *Monmouth* instead of *Radnor*; devised his estate, so misdescribed to be in *Radnor*, which was in truth the rever-

sionary estate, to his wife for life; remainder to his only son for life; remainder to his sons and daughters in tail, in strict settlement: remainder to his own daughter, &c., and devised the reversion only of his estate, so misdescribed to be in *Monmouth*, of which, in truth, he was seised in fee absolute, after the death of his wife and only son without issue, to his daughter, &c.; yet held, that enough appeared on the face of the will, which also described these estates as formerly belonging to his uncle, to shew that the deviser's intent was to pass the present interests of his estate in fee absolute, which was in the county of *M.*, and the reversion of his settled estate in the county of *R.*; although he had respectively misdescribed their local situations. *Mossley v. Massey*, M. 47 G. 3. 360

11 The deviser having devised certain estates to *A.* in fee; and to his executors "all his money," &c. stock upon his farm, with the implements of husbandry, and all other his personal estate of what nature or kind soever, in trust to pay debts and legacies, &c.; held that the devise of the stock upon his farm carried the standing crops of corn growing there at the time of his death from the devisees of the land to the executors; although there were assets sufficient to pay all the debts and legacies without that aid. *West v. Moore*, E. 47 G. 3. 443

12 *A.* mere right of entry, (the estate of the remainder-man having been devested by the fine of tenant for life) is not devisable. *Goodright v. Forrester*, T. 47 G. 3. 539

DEVESEE OF LAND.

An action of covenant does not lie upon the stat. 3 W. & M. c. 14, against the devisees of land to recover damages for a breach of covenant made by the deviser: but the remedy thereby given is confined to cases where debt lies. *Wilson v. Knubley*, H. 46 G. 3. 66

DISTRESS.

See LANDLORD AND TENANT, 8.

DOCTOR OF LAWS.

See MANDAMUS, 6.

DUTIES.

See HORSE-DUTY.

EJECTMENT.

See COPYHOLD, No. 2.

See FINE, 1. LANDLORD AND TENANT. WASTE, 1.

1 The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, her devisee, though after-

- wards admitted, cannot recover in ejectment; for his admittance has no relation to the last legal surrender; but the legal title remains in the heir of the surrenderor. Though if the first devisee had been considered to be admitted in construction of law, (the devise to her being in remainder after a devise to one who was customary heir of the surrenderor, and who paid rent to the lord for several years, but though required to come in and be admitted, had never done so;) or if the admittance of the first devisee's heir could be considered as an admittance, by relation back, of the first devisee herself; yet she not having surrendered to the use of her will, her devisee could not take the legal estate. But whether the heir of the surrenderor would be considered as a trustee for the second devisee, a court of equity is alone competent to decide. *Doc d. Vernon v. Vernon*, M. 46 G. 3. 12
- 2 The entry of a devisee after 20 years from the death of the testatrix in 1780, but within 20 years after the determination of a lease in 1800, before granted by her, (rendering rent, with a proviso for re-entry in case of non-payment) was neither tolled by a descent cast on the defendant from his father, who as heir at law of the testatrix had been admitted in 1782, and had received the rent to the time of his death in 1791, after which the defendant was admitted and received the rent; the doctrine of descent cast not applying to cases where the party has no remedy but by entry; as in the case of a devisee; nor to copyhold or customary estates where the freehold is in the lord; nor was such entry barred by the stat. of limitations 21 J. 1. c. 16; having been made within 20 years after the old lease expired; the devisee not being bound to enter before, as for a condition broken by the non-payment to her of rent. *Doc d. Cook v. Danvers*, H. 46 G. 3. 142
- 3 In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. *Roe d. West, v. Davis*, E. 46 G. 3. 173
- 4 The Court will not, after a trial, stay the proceedings on payment of the rent, &c.; the stat. 4 G. 2. c. 28, only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises. *ib.*
- 5 Under an agreement of demise, dated in January, of a dwelling-house, mills, and other buildings for the purpose of carrying on a manufacture, together with certain meadow, pasture, and bleaching grounds, watercourses, &c. for a term of 35 years, to commence as to the meadow ground from the 25th of December last; as to the pasture from the 25th of March next, and as to the housing, mills, and all the rest of the premises, from the 1st of May; reserving the first half year's rent on the day of Pentecost, and the other half year's rent at Martinmas; held that the substantial subject of demise being the house and buildings for the purpose of the manufacture, which were to be entered on the 1st of May; that was the substantial time of entry to which a notice to quit ought to refer, and not to the 25th of December, when the incoming tenant had liberty of entering on the meadow, which was merely auxiliary to the other and principal subject of demise: and consequently that a notice to quit served on the 28th of Sept. (which would have been sufficient with reference even to the 25th of March, the day of entering on the pasture ground; the 25th of September being the corresponding half-yearly day of holding to the 25th of March,) to quit at the expiration of the current year of holding was sufficient. *Doc d. Lord Bradford v. Watkins and another*, T. 46 G. 3. 257
- 6 Proof of notice to quit served on one of two tenants, to whom there was a joint demise, on the premises, is sufficient for the jury to presume that it reached the other tenant, who lived elsewhere. *ib.*
- 7 Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farmhouse, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease; held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain an ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doc v. Clark*, H. 47 G. 3. 375
- 8 An ejectment against the bailiffs pro tempore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation

to quit, served on its officers: after which the owner of the premises may distrain the cattle of any persons trespassing on his ground, or bring his action against them, or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman*, H. 47 G. 3.

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9 Where the possession and receipt of rents, issues, and profits of a trust estate, though for above 20 years after the creation of the trust, without any interference of the trustees, is consistent with and secured to the cestuy que trust by the terms of the trust deed, such possession is not adverse to their title, so as to bar their ejectment against his grantees brought after the 20 years. *Keene v. Deardon*, H. 47 G. 3.

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10 *A.*, a copyholder for life, remainder to *B.*, surrenders his own and *B.*'s estate, (over which latter he had no control, and by which he let in *B.*'s remainder,) and takes a new copy for the lives of himself, *C.*, and *B.*, successive; and on *A.*'s death, after 20 years had run against *B.*, *B.* enters on the possession then vacant; held that as against *C.*, who had no possession and no title, *B.* might defend his legal title, coupled with possession, in ejectment; however 20 years adverse possession by *A.* might have barred *B.*'s possessory right as against him; or might have disabled *B.*, if he had continued out of possession, from recovering in ejectment. *Doe v. Reads*, E. 47 G. 3.

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11 After verdict in ejectment for a message and tenement, the Court will give leave to enter the verdict, according to the Judge's notes, for the message only, (pending a rule to arrest the judgment,) without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway*, E. 47 G. 3.

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ELECTION.

See CORPORATION, 2, 3. 5.

Where there is no regular presiding sworn officer at an election (*s. g.* of churchwardens, one of whom by custom was chosen by parishioners paying scot and lot, and the other appointed by the rector, which latter in fact presided,) the control of the election devolves at common law upon the electors themselves; but unless there be a custom to regulate the time for making such election, it is not competent to a majority of the electors assembled at the time of such election to narrow the period which the common law would allow; and therefore a resolution by them that it shall conclude at a given time must at least limit a time reasonable in itself with respect to numbers and distance, and be of sufficient notoriety. But whether a resolution by a majority of the vestry on the first day of the election to close the poll

at four o'clock on the next day, in a parish where the number of electors did not exceed 180, and where the affidavits stated a custom for 200 years not to keep the poll open for more than two days, and no instance within living memory of extending it beyond four o'clock on the second day, were sufficient to warrant the closing of the poll at that time, while some of the voters were still coming in to poll, and others had no notice of the resolution, was a fit question to be tried upon a mandamus. *The King v. The Commissary of the Consistorial and Episcopal Court of the Bishop of Winchester in and for the Parts of Surry*, T. 46 G. 3.

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ELECTION COMMITTEE.

See COSTS, No. 3.

ELECTION OF REMEDIES.

See INSOLVENT DEBTORS, No. 2.

ENTRIES.

See EVIDENCE, No. 7.

ENTRY.

See EJECTMENT, No. 2.

ENTRY, Right of.

See FINE, 1.

EQUITABLE INTEREST.

See BAIL-BOND, No. 1.

A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey*, T. 47 G. 3.

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EQUITY OF REDEMPTION.

See MORTGAGE, 2.

ERROR, Writ of.

See COSTS, 9.

1 A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 J. 1. c. 8, either as a judgment upon an obligation conditioned for payment of money only; (the recognizance being to pay money or do something else;) or as a judgment upon a contract, which is there used in contradistinction to an obligation. *Dell v. Wild*, H. 47 G. 3.

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2 Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a superseas of execution as the first is; and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which is not within the statute, requiring bail in error, the writ of error is or is not a superseas ac-

coording to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Tristie*, E. 47 G. 3. 477

ESCAPE.

If an officer permit a prisoner to go at large on his promise to pay the debt to the creditor; in consequence of which he is obliged to pay the creditor himself; he cannot recover back the money from the debtor; being guilty of a breach of duty, out of which he cannot derive a cause of action. *Pitcher v. Bailey*, H. 47 G. 3. 369

ESTATE.

See *DEVISE*, No. 2.

ESTATE FOR LIFE.

See *LANDLORD AND TENANT*, 5.

ESTATES PUR AUTRE VIE.

See *OCCUPANT*.

EVIDENCE.

See *HUNDRED*, 1. *WARRANTY*, 2. *WAY*, 2.

1 The publisher of a public register receives an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom his letters should be directed; to which an answer is returned in the register; after which he receives two letters in the same hand-writing, directed as mentioned and having the Irish post mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed: This is a sufficient ground for the Court to have the letters read; and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register in *Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a *publication* by the procurement of the defendant in *Middlesex*. *Rex v. The Hon. Robt. Johnson*, M. 46 G. 3. 38

2 A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony. *Spenceley q. t. v. De Willott*, H. 46 G. 3. 57

3 Where a penalty is to be sued for before justices of peace within a certain time after the offence committed, upon a conviction for such offence returned by certiorari into *B. R.*, it ought to appear on the face of the evidence stated in such conviction, that the prosecution was in time: and if the witness be only stated to have mentioned the month in which the offence was committed, omitting the

year, and there be no word of reference to connect it with the true date, the omission cannot be supplied either by reference to the offence charged in the information, or by presumption arising from the justices having convicted the defendant. *Rex v. Woodcock*, H. 46 G. 3. 73

4 The right to convert a *brushwood* into a *stems* weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: and the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld v. Heraby*, H. 46 G. 3. 95

5 Whether or not a parish can have the benefit of the stat. 43 Eliz. c. 2; by maintaining its poor with not more than four overseers, is a fact which the Sessions ought to find, and not leave to be presumed by the Court from other conflicting evidence stated in a case reserved; such as that the parish had the benefit of the statute down to 1739, and that from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but that the population was decreased. *Rex v. Watson*, H. 46 G. 3. 104

6 In covenant for not granting a new lease, with a covenant for further renewal; held that an averment that the covenant for renewal in the indenture declared on correspondent with various other leases, before then successively made by the owners of the inheritance for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that all the former leases contained the same covenant for renewal. *Iggulden v. May*, H. 46 G. 3. 114

7 Where *A.*, tenant for life, with a limited power of leasing, reserving the ancient rent, received a letter from a confidential agent in 1728, containing a minute account of the tenants and rents of the estate; which letter the tenant for life indorsed "*A particular of my estate*," &c. and handed down to *B.*, the succeeding tenant for life, who had a like limited power of leasing, by whom it was also preserved and handed down amongst the muniments of the estate to the first tenant in tail; held that such paper was evidence for the tenant in tail against a leasee of *B.*, in order to shew that the rent reserved by *B.*, the tenant for life, was less than the ancient rent reserved at the time to which such paper referred; the paper having been accredited by the then owner of the estate, who had the means of knowing the fact, and who had an interest the other way, viz. to diminish the rent in order to increase his fine upon renewal under the power. And held also, that entries by *A.* the tenant

- for life in his book, of the receipt of the rent to the amount stated, were also evidence of the same fact. *Ros d; Brune, Clerk, v. Rawlins*, H. 46 G. 3. 133
- 8 The hand-writing of persons long since dead may be proved by comparison of hands. *ib.*
- 9 In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. *Rouse d. West v. Davis*, E. 46 G. 3. 173
- 10 Whether or not the fact of putting a letter into the post-office, containing notice of the dishonour of a bill to the drawer, to whom it was directed, be of itself sufficient evidence to be left to the jury that such notice reached the drawer; at any rate, if a bill be accepted payable at A's, who is the acceptor's banker, the party taking such special acceptance, (which he is not bound to do,) thereby impliedly agrees to present it for payment within the usual banking hours at the place where it is made payable; and if he present it after such hours, without effect, it is no evidence of the dishonour of the bill so as to charge the drawer. *Parker v. Gordon*, E. 46 G. 3. 183
- 11 Where the plaintiff declares upon a quantum meruit for work and labour done, and materials found, it is competent to the defendant, even without notice to the plaintiff, to prove that the work done was not worth so much as the plaintiff claims. And if it appear that the plaintiff has been paid on account as much as the work was worth, he cannot recover. And so it seems that the defendant may be let in to such a defence where the contract was for the work to be done at a certain price; at least if he give the plaintiff previous notice of such defence, that he may be prepared to meet it. And, quære, if the work done be wholly inadequate to answer the purpose for which it was undertaken to be performed, whether the defendant may not be let into such defence even without notice. *Basten v. Butler*, T. 46 G. 3. 225
- 12 Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate, if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet, having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms v. Powell*, T. 46 G. 3. 251
- 13 Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as, that he dismissed the plaintiff from his employ before the end of the term for which they contracted: but the special damage must be a legal and natural consequence of the slander. *Vicars v. Wilcocks*, M. 47 G. 3. 295
- 14 An indictment against certain commissioners for a contempt of an order of Sessions in not paying the costs of an appeal awarded against them; stating, generally, that the party appealed, to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute, and which notice was made, or purported to be made, under the powers to them given by the act; seems sufficient: for the Court will presume, as against the persons issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act. *The King v. Kingston and others*, M. 47 G. 3. 313
- 15 The party interested in a witness's testimony, who was objected to on account of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The Inhabitants of Castell Carcinion*, M. 47 G. 3. 329
- 16 The original book of acts, directing letters of administration to be granted, with the surrogate's fiat for the same, is evidence of the title of the party to whom the administration is directed to be granted of the intestate's effects, without producing the letters of administration themselves; notwithstanding subsequent letters of administration granted to another: the first not being recalled. *Elden v. Keddel*, H. 74 G. 3. 376
- 17 Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it, having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness's attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though

he had made an entry of it in his memorandum book for the private information of himself and the governor; which book was not produced; he having given it to the governor, who was gone abroad, without returning it to him: for such book, if in court, would not have been evidence per se; but could only have been used by the witness to refresh his memory. *Kensington v. Inglis*, H. 47 G. 3. 413

18 It lies on a party summoned as a witness before commissioners of bankrupt, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; supposing that a present inability to bear the expence of the journey is a lawful impediment. *Battye v. Gresley*, E. 47 G. 3. 434

19 Where a corporation, declaring in covenant by their modern name, stated that the citizens, &c. were from time immemorial incorporated by divers names of incorporation, and at the time of making the indenture by *A. B.* which they declared on, were known by a certain other name, by which name *A. B.* granted to them a certain watercourse, and covenanted for quiet enjoyment: held that the deed granting the watercourse, to them by such name, was evidence as against the defendants, who claimed under the grantor, that the corporation was known by that name at the time, when upon an issue taken on that fact. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 510

20 Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child, is not admissible to prove the birth settlement of such child. *The King v. The Inhabitants of Erith*, T. 47 G. 3. 532

21 Where an instrument is produced at the trial by one of the parties, in consequence of notice from the other; which when produced appeared to have been executed by the party producing it and third persons, and to be attested by a subscribing witness; the production of it in that manner does not dispense with the necessity of proving the instrument by means of the subscribing witness, though unknown before to the party calling for it. *Gordon v. Secretan*, T. 47 G. 3. 537

EXECUTION.

See ERROR, Writ of.

1 A defendant, superseded for want of being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment. Aliter, if superseded for want of proceedings in time before judgment. *Line v. Low*, H. 46 G. 3. 156

2 Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of

execution as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Tristie*, E. 47 G. 3. 477

3 A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey*, T. 47 G. 3. 501

EXECUTOR.

See ADMINISTRATOR, &c.

FALSE IMPRISONMENT.

1 The stat. 13 G. 3. c. 80, gives a penalty in case of killing game on a Sunday, and directs that it shall be forthwith paid on conviction, and that in case of neglect or refusal to pay, or give security for the payment of it, the justice shall by warrant under his hand and seal cause the same to be levied by distress and sale of the offender's goods; and that it shall be lawful for such justice to order such offender to be detained in custody until return may conveniently be made to such warrant of distress, unless the party convicted shall give security for his appearance, &c. Held that such order to detain in custody until the return of the warrant of distress may be by parol. *Still v. Walls and Harris*, T. 46 G. 3. 249

2 The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.*, and averring that it was issued against *A. B.* by the name of *C. B.* and that they are one and the same person; there being no averment that *A. B.* was known as well by the name of *C. B.* *Shadgett v. Clipson*, E. 47 G. 3. 438

FELONY.

The party interested in a witness's testimony, who was objected to on account of his having been convicted for felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The Inhabitants of Castell Careinion*, M. 47 G. 3. 329

FEME COVERT.

See BARON AND FEME.

FINE.

1 The fine of a tenant for life divests the estate of the remainder-man or reversioner, leaving in him only a right of entry, to be exercised either then, by reason of

the forfeiture, or within five years after the natural determination of the preceding estate. And the effect of the stat. 4 H. 7. c. 24, is only to save all the remainder-men their respective rights of entry within five years after their respective titles accrue, without a subsequent remainder-man being prejudiced by the laches of another remainder-man who preceded him. *Goodright v. Forrester*, T. 47 G. 3. 539

- 2 The effect of a fine by a tenant for life of parcel of a manor, the reversion of which parcel was in the tenant in fee in possession of the other parts of the manor, is to sever such parcel from the manor. *ib.*

FISHERY.

See MANDAMUS, No. 4. WEIR.

FOREIGN ATTACHMENT.

- A creditor for goods sold and delivered to a trader, who had committed a secret act of bankruptcy, not being cognizant thereof, attached money of the trader's in the hands of a third person, and recovered judgment in the mayor's court of London against the garnishee, who thereupon paid him the amount of the debt so attached: and afterwards a commission issued: held that this payment was not protected by the stat. 19 G. 2. c. 32, not being a payment made by the bankrupt in the usual and ordinary course of trade and dealing: and held that the assignees of such bankrupt, under a third commission issued against him, might sue for and recover back such payment, although the bankrupt who had obtained his certificate under his former commissions, had not paid 15s. in the pound under the second of them; in which case his future effects remain liable to that extent to his creditors under the second commission respectively. *Hovil and others, Assignees of Wardel, a bankrupt, v. Browning*, H. 46 G. 3. 77

FRAUDS, STATUTE OF.

See COPYHOLD, &c. No. 5. SALE OF GOODS BY SAMPLE.

FRAUDULENT CONVEYANCE.

See BANKRUPT, No. 2.

FREEHOLD.

See COPYHOLD, &c. No. 3.

FREIGHT.

See INSURANCE, No. 1. 4.

- 1 By a charter-party of affreightment the owner of the ship covenanted to take on board at London the freighter's goods, and proceed therewith to *Monte Video*, and there to deliver them to the freighter's agent, and receive from him another

cargo, and (wind and weather permitting) proceed therewith to his port of discharge in G. B., and there deliver the same to the freighter, and end the said voyage. In consideration whereof the freighter covenanted to pay 670l. per month for freight, during the said intended voyage to M. V., and back to her port of discharge; such freight to commence from the day the ship should be ready to receive her outward bound cargo, and to end when we should have finally discharged the whole; and also to pay two thirds of all pilotage and port charges during the said voyage; such freight, pilotage, and port charges to be paid on the arrival and discharge of the ship at her destined port in G. B.—

In covenant by the owner for an alleged breach in non-payment of freight, pilotage and port charges, it is not enough to shew that the ship after having taken in a cargo in G. B. and proceeded part way on the voyage, but before her arrival at M. V., was, without the default of the owner or crew, wrongfully seized and brought back to London and there detained for some time till she was restored to the owner; in consequence of which she required repairs, which were done with all necessary dispatch, and that the owner was then ready and willing to cause the ship to prosecute and complete her voyage, and gave notice thereof to the freighter, and tendered him the ship properly fitted, &c. for that purpose, and requested him to give the necessary instructions in that behalf, and offered to observe the same, &c. but that the freighter would not give any such instructions, &c. nor permit the ship to prosecute or complete the voyage; but refused to do so, and wholly renounced the charter-party, and the further prosecution of the voyage, and wholly discharged the owner from further prosecuting or completing the voyage, and dispensed therewith.

For the freight (qua freight,) pilotage, and port-charges, are only covenanted to be paid by the freighter on the arrival and discharge of the ship at her destined port in G. B., and therefore such arrival and discharge, (which must be understood after the stipulated voyage performed,) are conditions precedent to the owner's right to freight, &c. And it is not enough to shew that the owner did all in his power towards earning the freight, &c. by the tender of his ship to complete the voyage, and his offer to obey the freighter's instructions; because, though the owner had actually done, as far as lay in his power, all that he offered to do, and which the freighter discharged him from doing, it would only have amounted at most to an endeavour on his part to complete the voyage and earn the freight, &c. but such completion was still liable to be defeated by the act of God, or the accidents of the voyage; and the performance of

the condition which was to entitle the owner to freight, &c. would still have been *contingent*, although such his offers had been accepted by the freighter. Therefore this is not like the cases where a party tendering to do that which he has undertaken, and which he has the *immediate* power of doing at the time, in order to entitle himself to a concurrent duty from another, is by a refusal of that other to accept such tender, dispensed with the necessity of averring performance of it, in an action for a breach in not performing the subsequent or concurrent duty. *Smith v. Wilson*, E. 47 G. 3. 468

GAME.

See COMMITMENT BY PAROL. PENAL ACTION, No. 1.

GENERAL ISSUE.

A defendant, in trespass, cannot justify under the general issue, the cutting the posts and rails of the plaintiff, though erected on the defendant's own land; there being no question raised as to the property remaining in the plaintiff. *Welch v. Nash*, E. 47 G. 3. 469

GRANT.

See COVENANT.

1 A. and B. being severally seised of parcels of woody ground, and B. having other lands adjoining to his woody ground, and intending to make a colliery under his ground, A. grants to B., *his heirs and assigns*, liberty for him, *his heirs and assigns*, to carry up a sough or drain through A.'s woody ground, into B.'s woody ground, and also liberty for B., *his heirs and assigns*, to make two little sough pits in A.'s woody ground, for the more easy and safe carrying up the tail of the sough, one of which was to be covered in *as soon as conveniently might be after making the sough*, and the other to be kept open for examining the sough *so long as was necessary for that purpose and no longer*; and B. covenanted that he, *his heirs and assigns*, would not damage the trees growing on A.'s woody ground, nor get any of the coals under it, except what should arise in the drift of the intended sough; and that A., *his heirs and assigns*, from time to time, and at all times after, might go down into any pit or pits of B., his heirs or assigns to discover whether any coals of A., his heirs or assigns, should be gotten; and that B., *his heirs and assigns*, should repair any injury to A.'s fence, &c.: held that by the grant to B., *his heirs, &c. of the liberty of making the sough in A.'s land*, the liberty of making *sough pits* at any time afterwards, while the object of the grant remained, *being necessary for the purpose of repairing the sough*, passed as *incident* thereto; and that the use of such sough, for the

carrying up of which into B.'s woody ground liberty was granted, was not confined to the getting of coals under B.'s woody ground, but extended also to the adjoining lands of B.; and that the liberty of making new sough pits for necessary repairs of the sough, after the two original sough pits had been covered up by mutual consent, was not controlled by the special liberty given for making such original sough pits the uses of which were limited by the grant; it appearing upon the face of it that the grant of the sough was intended to have continuing operation while any coals in B.'s woody ground and adjoining lands remained to be gotten. *Hodgson v. Field*, T. 46 G. 3. 285

2 An inclosure act having directed that the allotments made by the commissioners should for ever remain for the benefit of the appointees; held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and *their successors*, for the benefit of the parish of B., though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Johnson v. Hodgson*, M. 47 G. 3. 312

GROWING CROPS.

See DEVISE, 10.

GUARANTIE.

1 A guarantie in writing, for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp acts, "a contract for or relating to the sale of goods," and need not be stamped. *Warrington v. Furber*, H. 47 G. 3. 399

2 The vendee having accepted a bill of exchange for the price of the goods, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a *prima facie* warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill: however it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have been paid. *Warrington v. Furber*, H. 47 G. 3. 399

GUARDIANSHIP.

See **BASTARD, No. 2.**

HABEAS CORPUS.

See **SEAMAN, 1.**

- 1 Where, upon a habeas corpus to bring up the body of an apprentice, the keeper of the House of Correction returned, with the body of the party, a regular conviction of him by two magistrates on the stat. 20 Geo. 2. c. 19, for a misdemeanor in absenting himself as an apprentice from his master's service; it is no answer to shew by affidavit that the party had bound himself *when an infant* to serve till 25, and that when he came of age he elected to avoid the indentures; after which the offence imputed had been committed: for this was proper matter to be shewn to the magistrates below, who, if the matter shewn to them were true, acted at their own peril in committing the party; but this Court have no power to discharge an apprentice from his indentures; and are bound by the return of a regular conviction, where the objection does not appear on the face of the return, to remand the party. *Ex parte Gill, E. 46 G. 3.* 179
- 2 The Court will grant a habeas corpus to bring up the body of a bastard child, within the age of nurture, for the purpose of restoring it to the custody of the mother, from whose quiet possession it was taken, at one time by fraud, and afterwards by force: and this, without prejudice to the question of guardianship, which belongs to the Lord Chancellor representing the king in Chancery. *The King v. Hopkins and Wife, T. 46 G. 3.* 270

HAND WRITING.

See **EVIDENCE, No. 1.**

HIGHWAY.

See **WAY.**

Under the 19th sect. of the general highway act 13 G. 3. c. 78, a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the order of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash, E. 47 G. 3.* 469

HORSE DUTY.

- 1 By stat. 44 G. 3. c. 98, schedule B, the duty, which before was laid on horses

let to hire for *travelling post* by the mile or stage, is now laid on horses let to hire *to travel by the mile or stage*: and persons licensed by schedule A. of that act to let horses to hire to *travel post*, by the mile or stage, must account for the duty according to schedule B. on such lettings to hire as therein mentioned. But, quære as to lettings to hire *for the day* to go to certain places and back again. *Welsford v. Todd, T. 47 G. 3.* 551

- 2 The same construction was put upon a hiring of a hackney coach under the *Liverpool act. Rex v. Swift, Excheq. M. 30 G. 3, cited ib.* 553

HUNDRED.

The declaration in an action on the statute 9 G. 1. c. 22. s. 8, to recover damages against the hundred for the value of a stack of corn maliciously burnt, alleged that notice of the fact was given within two days to the inhabitants of the *parish* (instead of the "*town, village, or hamlet*," which are the words of the act,) near the place, &c. yet as the law *prima facie* intends every *parish* to be a *vill*, unless the contrary be shewn, this allegation is sufficient after verdict to sustain judgment for the plaintiff. But if it had been shewn at the trial that the parish consisted of several vills, and that the notice had been given to one more distant than another, the defendants would have been entitled to a verdict. *Cook v. The Hundredors of Pimhill, H. 47 G. 3.* 370

HUSBAND AND WIFE.

See **BARON AND FEME.**

IMPRESSING.

See **BAIL, No. 1.**

INCLOSURE.

The owner of a tenement may have two distinct rights of common for his cattle *levant and couchant* upon such tenement; upon different wastes, in different manors, under several lords; and therefore an allotment under one inclosure act, in lieu of his right of common upon one of such wastes, will not do away or lessen his claim for an equal allotment with other commoners, under a subsequent act for inclosing the other waste. *Semblo aliter*; if the different wastes had appeared to have been originally holden under the same lord. *Hollingshead v. Walton, T. 46 G. 3.* 228

INCLOSURE ACT.

See **STATUTE, 1.**

INDEMNITY.

Bail who are indemnified, being sued upon the bail-bond, file a bill in equity for an injunction, suggesting want of consideration for the original debt; and an injunc-

tion is granted pro tempore on condition of paying the debt into court; which is done accordingly; and afterwards the money is paid over: held that the bail were damaged by such payment of money into court after the notice to the debtor, and no fund provided by him; and not merely from the time when the money was taken out of court upon dissolving the injunction. For one who agrees to indemnify, and *save* others harmless against a certain engagement, is bound to secure them from incurring any expence, as it runs on at the time, which falls upon them by virtue of that engagement. *Sparks v. Martindale*, T. 47 G. 3. 557

INDICTMENT.

See MANDAMUS, 7. WAY, 1, 2.

- 1 One who was appointed collector of the Property-tax by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties by colour and pretence of being collector of such duties; though the money were fraudulently collected and misapplied by him; because he was in fact appointed collector, and in that character received the money. And quare, whether the stat. 43 G. 3. c. 99. s. 19, having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any penalty other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the act. *The King v. Dobson*, H. 46 G. 3. 105
- 2 It is no objection, on demurrer, that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the Court to quash the indictment. *The King v. Kingston and Others*, M. 47 G. 3. 313
- 3 And an indictment against certain commissioners for a contempt of an order of Sessions, in not paying the costs of an appeal awarded against them, stating generally, that the party appealed to the Sessions against a certain notice in writing under the hands of five commissioners acting in the execution of the statute; and which notice was made, or purported to be made, under the powers to them given by the act, seems sufficient: for the Court will presume, as against the person issuing such notice, that it was signed by them when lawfully assembled at a public meeting holden by virtue of the act. (Vid. Appeal, No. 1 & 2.) *ib.*
- 4 But counts in the indictment stating an appeal against a notice in writing, signed by A., B., C., D., and E., five of the

commissioners, and an order by the Sessions that the commissioners acting under the statute, and being the respondents in the said appeal, on service of the said order, should pay the appellant 10*l.* costs of appeal; and alleging service of the order on those five and others acting as commissioners, &c.; and then charging that at a subsequent meeting held by virtue of the act, A. B. (omitting C.) D. and E., and also F. and G., commissioners, were present and acting, and formed a majority, a demand of the 10*l.* costs was made on those six, which they refused to pay: and other like counts, charging service of the order upon part only of those who were indicted for a contempt of it: were, on general demurrer, holden bad. And the offence being laid jointly against the several sets of defendants in each count, the Court could not give judgment, on such an indictment, even against the four who were parties to the appeal, and on whom service of the order was alleged; there being no one count including those only. *ib.*

- 5 A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him. *The King v. Gibson*, M. 47 G. 3. 342
- 6 Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 411
- 7 Any person making or knowingly using a false affidavit taken abroad (though perjury could not be assigned on it here) in order to mislead our own courts and to pervert public justice, is punishable by indictment as for a misdemeanor. *Omealy v. Newell*, E. 47 G. 3. 455

INFANT.

An infant can on no account bind himself in a bond with a penalty conditioned for payment of interest as well as principal. *Fisher v. Moubray*, E. 47 G. 3. 439

INFERIOR JURISDICTION.

See COURT OF REQUESTS.

INSOLVENT DEBTORS.

See INDEMNITY, 1.

- 1 The stat. 2 G. 2. c. 22, and other acts of the same class, making general provisions for the relief of insolvent debtors, charged in execution on process issuing out of any of the courts of Law, extend to inferior as well as superior jurisdictions. But the application in both instances must be made before the end of the next term after the prisoner is charged in execution; except he can shew that his neg-

lect arose from ignorance or mistake. *The King v. The Bailiffs of Ipswich*, M. 46 G. 3. 47

- 2 Mandamus to the Quarter Sessions to inquire and give the benefit of the insolvent debtors' act to a prisoner, if he were entitled to it, denied, where, it appeared that he was in execution on the 1st of Jan. 1804 for a larger sum than the act extended to; though part of such sum were composed of a debt upon a judgment recovered, which the judgment creditor had an election given to him by the Lord Chancellor to prove under the commission by a future day, not arrived; but which it was stated that he had elected so to prove, and to abandon his judgment before the 1st of Jan. 1804, though the prisoner was not discharged by a judge's order from such execution till long after that day. *Ex parte John King*, M. 46 G. 3. 49

- 3 The insolvent debtors' act of the 41 G. 3. c. 70 only discharges the person, and not the effects of the debtor, as appears by s. 38, giving the plea of discharge; though s. 4, in the terms of it includes both, but with reference to the subsequent provision. *Bell v. Sanderson*, M. 47 G. 3. 319

- 4 It is not enough in an order for remanding an insolvent debtor by the Sessions, to state that it appeared that he had obtained goods of A. B. (at whose suit he was detained) by false pretences; for either it should be stated in the words of the stat. 41 G. 3. c. 70. s. 40, (by virtue of which the order was made) that the party *knowingly and designedly* by false pretences obtained the goods; or at least, that he *fraudulently*, by false pretences, obtained them; the description of the offence adopted by the stat. 46 G. 3. c. 108. s. 39, with reference to the former statute; (which word *fraudulently* is also used in the recital of the section in the former act.) And a second order of remand, however regular under the last statute, professing to be made upon view of the former defective order, was therefore quashed. But it is competent to any existing creditor to object to the discharge of an insolvent debtor, on due proof of such former offence described in the statute; though he were not a creditor at the time of such former order of remand made. *The King v. Tomkins*, H. 47 G. 3. 373

- 5 Where the defendant in the action gave a cognovit for the debt and costs payable by seven instalments; and after the bail were fixed an act passed for discharging insolvent debtors in custody for debts due at a certain day, prior to the bail being fixed, at which day three only of the instalments were payable; and afterwards the principal was discharged under the act, when only two more of the instalments had become payable; yet held that the bail were liable for the whole condemnation money; the entire debt,

qua debt, being due instantly, with a stay of execution only for certain portions at certain times. *Shakespeare v. Phillips*, E. 47 G. 3. 486

INSURANCE.

- 1 While a ship was forcibly detained in a foreign port, the owner abandoned first the *ship*, and then the *freight*, to the different sets of underwriters thereon, who paid as for a total loss; after which the ship was liberated, reshipped her cargo, which had been taken out, and returned home, *earning freight*, which was received by the assured. Quære, whether the assured, after an abandonment of the *ship*, (which was a *seeking*, and not a *chartered* ship; on which a distinction may arise;) could abandon the *freight* to another set of underwriters? But assuming that he might, the ship and freight are *salvage* to the different underwriters, after deducting the following expences, which must be apportioned between them according to their several interests: 1. The expences of ship and crew in the foreign port, including port charges (besides the expence of shipping the cargo, which exclusively belongs to the underwriters on *freight*.) 2. Insurance thereon. 3. Wages and provisions of the crew from their liberation in the foreign port till their discharge here. 4. Wages (provisions were supplied by the foreign Government) to the crew during their detention. But the assured was not entitled to deduct out of the freight received payable to the underwriter on freight, 1. Charges paid at the port of discharge on ship and cargo. 2. Insurance on ship. 3. Diminution in value of ship and tackle by wear and tear on the voyage home. *Sharp v. Gladstone*, M. 46 G. 3. 19

- 2 A vessel sailing with corn, insured from *Waterford* in *Ireland* to *Liverpool*, by a policy with a memorandum to be free from all but general average, was stranded near *Waterford* on the 28th of Jan. and the vessel continued at high tide under water for near a month, during which time, from the 31st, the assured at low water were employed in saving the cargo, the whole of which was damaged, but the greater part recovered and kiln-dried; but no notice of abandonment was given to the underwriters in *London* till the 18th of Feb.; though there is a constant regular intercourse between *Waterford* and *Liverpool*, where some of the assured lived: which notice was holden to be out of time. For whether or not upon such a policy, where there was an opportunity of sending the corn saved to the place of its destination, within two months after the accident, in another vessel, the assured were entitled to abandon, as in case of a total loss; at all events they ought to have made their election to abandon within a reason-

- able time, (on which it seems that the judge ought to instruct the jury under the circumstances of the case;) and they cannot take the chance of endeavouring first to save and make the best of the cargo on their own account, and afterwards abandon when they find that they cannot turn it to their advantage. *Anderson v. The Royal Exchange Assurance Company*, M. 46 G. 3. 26
- 3 Goods insured on board a certain ship generally by her name, without any addition of country, and not represented to be of any particular country at the time of the policy subscribed; though the broker had before said she was an American when the slip was subscribed, and though she were in fact an American, need not be documented as such: and therefore in case of a capture by a foreign state for want of the documents required by treaty between that state and her own, the owner of the goods may recover against the underwriters. *Dunson v. Atty.*, E. 46 G. 3. 175
- 4 Where a ship was chartered on a voyage from London to Dominica and back to London, at a certain rate of freight upon the outward cargo; and after delivering her outward cargo at Dominica, the charterers were to provide her a full cargo homeward at the current freight from Dominica to London, &c.: held that an insurance by the owner of the ship on the freight, at and from Dominica to London, attached while the ship lay at Dominica delivering her outward cargo, and before any part of the homeward cargo was shipped, during which time she was captured by an enemy; the contract of affreightment by the charter-party being entire, and the risk on the policy having commenced. *Horncastle v. Stuart*, E. 46 G. 3. 191
- 5 Colonial produce cannot legally be shipped from the British West Indies for Gibraltar, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one of the West India islands, with liberty to exchange it at another, (which would have been legal,) if in fact it were not exchanged, and its ultimate destination was Gibraltar. And the ship and cargo being lost off Gibraltar; though the assured could not recover, yet the premium having been paid upon an illegal insurance cannot be recovered back. *Lubbock v. Potts*, T. 46 G. 3. 212
- 6 Quere, Whether an insurance of a British ship against "British capture, seizure, and detention," be illegal and void; as such a capture, &c. may be without lawful authority. *Lubbock v. Potts*, T. 46 G. 3. *ib.*
- 7 A ship on an African voyage, the common duration of which is several months, and sometimes extends to a twelvemonth more, arrived on the coast in August '99, and in Feb. 1800 her then commander wrote a letter to his owners, mentioning an attack on her at another place on the coast by the natives, who killed the captain and several of the crew, and wounded others; by means of which and of a fever the crew were reduced to five, and all those sickly, and not a man to be procured at hand: that they had been plundered of their clothes, &c. and their cabin stores were exhausted, and they did not know what to do. A second letter, dated 21st April 1800, from Gaboon River, mentioned their arrival there on the 24th March: that the natives finding them weakly handed, and their goods taken from them, did as they pleased: that they had then nine men on board; but their provisions run very low: that he had mentioned certain parts of the cargo in his last letter, and expected to ship the rest, and to sail at the end of the next month. An insurance was effected in September 1800, on the production of the last letter only, "at and from the ship's arrival at her first place of trade on the coast of Africa," &c. Held sufficient that the last letter truly stated the then condition and circumstances of the ship: which, though better than when the first letter was written, was yet no fraudulent concealment of the former circumstances; the second letter, both in its terms and contents, referring to a former letter; which it was the fault of the underwriters not to have called for, if they thought that a particular knowledge of former difficulties, in part subdued, and to the extent truly stated in the second letter, would have varied the risk: and when the underwriters, cognizant as they must be presumed to be of the common duration of such a voyage, could not fairly collect from the contents of the second letter that the first arrival of the ship on the coast was only on the 24th of March, when she was stated to have arrived in Gaboon River, and to have had much of her homeward-bound cargo on board on 21st of April, and was expected to sail with the remainder by the end of May. *Freeland and Another, Assignees of Tipping, a Bankrupt, v. Glover*; T. 46 G. 3. 216
- 8 Barratry is any fraudulent or criminal conduct against the owners of ships or goods by the master or mariners, in breach of the trust reposed in them, and to the injury of the owners: although it may not be done with intent to injure them, or to benefit at their expense the master or mariners. And, therefore, where a master had general instructions to make the best purchases with dispatch: this would not warrant him in going into an enemy's settlement to trade (which was permitted by the enemy) though his cargo could be more speedily and cheaply completed there; but such act, in consequence of which the ship was seized and confiscated, is barratrous. *Earle v. Rowcroft*, M. 47 G. 3. 350

- 9 So is sailing out of port, without paying port duties, whereby the goods are forfeited, lost, or spoiled. *Knight v. Cambridge*, cited. *ib.* 354
- 10 And it matters not that the captain is also supercargo. *ib.*
- 11 Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th of June, extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th section of the stat. 35 G. 3. c. 63, which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the terms or conditions of any policy, &c. *Kensington v. Inglis*, H. 47 G. 3. 413
- 12 Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, was licensed by the king's authority; held that an insurance on the enemy's ship, as well as on the goods and specie put on board for the benefit of the British subjects, was incidentally legalized; and that it was competent for the British agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *Kensington v. Inglis*, H. 47 G. 3. *ib.*
- 13 A policy effected on "ship and outfit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent, after the ship sails, and the risk attaches, to an insurance on "ship and goods," without a new stamp; outfit, the subject-matter of insurance, being essentially different in such a voyage from goods; and therefore not within the exception of the stat. 35 G. 3. c. 63. s. 13, which enables alterations to be made in the terms or conditions of a policy, without having a new stamp, so that the thing insured remains the property of the same persons, &c. *Hill v. Patten*, E. 47 G. 3. 459
- 14 It seems however that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the African and other trades,) out and home, may be covered by an insurance on goods. *ib.*

INTEREST.
See INFANT, 1.

JUDGMENT.
See VERDICT, 1.

JUDICIAL PROCEEDINGS.
See SEWERS.

It is libellous to publish a highly coloured
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account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in court, which contained an insinuation that the plaintiff had committed perjury: and it is no justification to such insinuation of perjury against the plaintiff (who had sworn to an assault by A. B. on him) that it did appear (which was the suggestion in the libel) from the testimony of every person in the room, &c. except the plaintiff, that no violence had been used by A. B. &c.; for non constat, thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to such parts of the supposed libel as purport to contain an account of the trial, &c., and that the said parts contain a just and faithful account of the trial, &c. *Stiles v. Nokes*, T. 36 G. 3. 231

JURISDICTION.

See COURT OF REQUESTS.

See CONVICTION, No. 1. COURTS. SEWERS, No. 1.

- 1 It seems that a stock broker is liable to pay to the Chamberlain of London, for the benefit of the corporation, the annual duty of 40s. directed by stat. 6 Ann. c. 16. s. 4, to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the London Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10l. (the Court having jurisdiction only to the extent of 5l.) from the broker, upon which he might be sued in the superior courts; and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein. For under the statute of Anne their chamberlain is a trustee for the corporation; and a bond taken by them in their own name for securing the 40s. duty is no merger of the ordinary remedy given to their chamberlain by the legislature. Neither is the right of the chamberlain to sue in the Court of Requests, which has always been the practice, affected by the acintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest. *The King v. The Commissioners of the London Court of Requests*, H. 46 G. 3. 139
- 2 The St. Alban's paving and regulating act, 44 G. 3, empowers five commissioners, assembled at a public meeting holden

- by virtue of the statute, to do certain acts; amongst others, to deliver notice in writing to any inhabitants to abate nuisances and encroachments in the street before their houses: and on failure, empowers the commissioners to abate them; and gives an appeal to the Quarter Sessions of the borough "against any matter or thing to be done by the commissioners in pursuance of the act;" held that an appeal lay against such notice in writing; such construction being within the words of the act, &c. and most beneficial for the commissioners themselves, as well as for the inhabitants whose property was to be affected by such acts. *The King v. Kingston and Others*, M. 47 G. 3. 313
- 3 Though the act says, that "all monies paid, expended by, or recovered against the commissioners or their treasurer, &c. by means of any action, prosecution, &c. or appeal, for any cause relating to the act, or any thing done by or under the authority of the same, shall be defrayed out of the money in the hands of the treasurer; it does not extend to discharge the commissioners from personal responsibility, in the first instance, for the costs of an appeal awarded to be paid by them; however, they may afterwards recoup themselves out of the fund in the treasurer's hands. *ib.*
- 4 The statute 20 G. 2. c. 19, giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers" employed for any certain time, or in any other manner, respecting wages within certain sums, extends to labourers of all descriptions, and not merely in the particular trades or business there enumerated: and consequently includes wages earned by a labourer, who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 344
- 5 The party appealing to the Sessions is not thereby concluded from afterwards disputing its jurisdiction in the particular case. *Lowther v. The Earl of Radnor*, M. 47 G. 3. 344
- 6 Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having due notice of such complaint, and being properly summoned to attend. *ib.* 344
- 7 By the general highway act 13 G. 3. c. 78, a new highway must be set out before an old one can be stopped up, and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up, may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash*, E. 47 G. 3. 469
- 8 The propriety of granting a warrant, by commissioners of bankrupt, for the arrest of a witness refusing to obey their summons, being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to the officer to make out such warrant must be taken to include their direction as to the persons to whom it is to be directed: but the mere act of signing the names of the commissioners to the warrant may be done by them separately. *Batty v. Gresley*, E. 47 G. 3. 434

JURY.

See SEWERS.

KIN.

See ADMINISTRATION, 3.

LABOURERS.

See MASTER AND SERVANT, 1.

LANDLORD AND TENANT.

See LEASE.

- 1 The lessor, after a demise of certain premises with a portion of an adjoining yard, covenanted that the lessee should have "the use of the pump in the yard jointly with himself, whilst the same should remain there, paying half the expences of the repair." The words *whilst*, &c. reserve to the lessor a power of removing the pump at his pleasure; and it is no breach of the covenant though he remove it without reasonable cause, and in order to injure the lessee. But without those words it would have been a breach of covenant to have removed the pump. *Rhodes v. Bullard*, H. 46 G. 3. 60
- 2 Where assignees of a bankrupt advertised the lease of certain premises, of which the bankrupt was lessee, for sale by auction, (without stating themselves to be the owners or possessed thereof,) and no bidder offering, they never took possession in fact of the premises; held that this was no more than an experiment to ascertain the value, whether the lease were beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term, nor support an averment in a declaration in covenant against them by the landlord, that all the estate, right, title, interest, &c. of the bankrupt in the premises came to the defendants by assignment thereof.

Turner v. Richardson and another Assignees of Barber, a Bankrupt, E. 46 G. 3.

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3 But in an action for use and occupation brought against the assignee of a bankrupt, to whom a house was let, proof that the landlord had applied to the assignee after the bankruptcy, to know if he meant to take the bankrupt's interest in the house, to which the assignee answered that if he did not let it by *Lady-day* he would give it up; and he afterwards accordingly paid up the rent to that day, and offered the key, *Lord Kenyon, C. J.* held him liable. *Broome v. Robinson*, at Westminster, December 1800, cited.

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4 In ejectment upon a clause of re-entry in a lease on non-payment of rent against the assignee of the lease, proof by the lessor of the counterpart of the lease, by the subscribing witness, is sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent. And where the witness who proved the demand of the rent had a power of attorney from the lessor for that purpose, which he notified to the tenant, and had ready to produce; held sufficient, though he did not produce it at the time of the demand; the tenant not questioning his authority. *Rowe d. West v. Davis*, E. 46 G. 3.

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5 The Court will not, after a trial, stay the proceedings on payment of the rent, &c.; the stat. 4 G. 2. c. 28, only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises.

ib.

6 An agreement to lease at a certain rent, and that the lessor should not turn out the tenant so long as he paid the rent, and did not sell any article injurious to the lessor's business, either purports to be a lease for life, and would then be void, as not being createable by parol; or if it operate as a tenancy from year to year, it must necessarily be determinable by either party giving the regular notice to quit. *Doe v. Brown*, H. 47 G. 3.

366

7 Where one leased for 21 years, if the tenant, his executors, &c. should so long continue to inhabit and dwell in the farm house, and actually occupy the lands, &c. and not let, set, assign over, or otherwise depart with the lease; held that the tenant having become bankrupt, and his assignees having possessed themselves of the premises and sold the lease, and the bankrupt being out of the actual possession and occupation of the farm, the lessor might maintain ejectment without a previous re-entry; the continuance of the term itself being made to depend upon the lessee's actual occupation. *Doe v. Clarke*, H. 47 G. 3.

375

8 An ejectment against the bailiffs pro

tempore of a corporation cannot be maintained by proving payment of rent for the premises by the annual predecessors of the defendants in the same office for several years before, and service of the notice to quit on the defendants, the existing bailiffs; for the payment of such rent by the bailiffs in succession is merely evidence of a tenancy in the corporation. But at any rate such tenancy may be determined by a notice to the corporation to quit, served on its officers: after which, the owner of the premises may distrain the cattle of any person trespassing on his ground; or bring his action against them; or maintain ejectment against any person in the actual possession of the premises. *Doe v. Woodman*, H. 47 G. 3.

393

9 If trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright v. Vivian*, H. 47 G. 3.

377

10 Assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued; which were pleaded in bar. *Boat v. Wilson*, E. 47 G. 3.

430

11 Debt does not lie against a bankrupt on the reddendum of a lease for rent accruing after the commissioners' assignment; the lessor's assent to such assignment being virtually included in the act of parliament authorizing the assignment of the bankrupt's estate. *Wadham v. Marlow*, M. 25 G. 3.

432, n.

12 Where a demise is for a certain time, no notice to quit is necessary at or before the end of the term, to put an end to the tenancy: but a demand of possession and notice in writing, &c. are necessary to entitle the landlord to double rent or value; and such demand may be made for that purpose above six weeks afterwards, if the landlord have done no act in the mean time to acknowledge the continuation of the tenancy; and he will thereupon be entitled to double value as from the time of such demand, if the tenant hold over: but if the rent were before reserved quarterly, and such demand be made in the middle of a quarter, the landlord cannot recover single rent for the antecedent fraction of such quarter. *Cobb v. Stokes*, E. 47 G. 3.

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LARCENY.

See NAVAL STORES.

LAND-TAX.

This is in the frame of it, a personal tax. *Rex v. The Inhabitants of Armouth*, E. 47 G. 3.

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LEASE.

See EVIDENCE, No. 7. LANDLORD AND TENANT.

One in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 5*s.* 9*d.*, demised certain ground, with the buildings, &c. for 21 years, with a proviso for distress if the rent were in arrear for 14 days. And the lessor covenanted at the end of 18 years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of 21 years, at the like yearly rent, with ALL covenants, grants, and articles, as in that indenture were contained. Held that this covenant was satisfied by the tender of a new lease for 21 years containing all the former covenants except the covenants for future renewal. And held, that an averment, that the covenant for renewal in the indenture declared on corresponded with various other leases, before then successively made by the owners of the inheritance, for the time being, could not be taken in aid to construe the meaning of the indenture: for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non-constat from this averment, that all the former leases contained the same covenant for renewal. *Iggulden v. May*, H. 46 G. 3. 114

LIBEL.

See EVIDENCE, No. 1.

It is libellous to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in Court; which contained an insinuation that the plaintiff had committed *perjury*: and it is no justification to such insinuation of *perjury* against the plaintiff, (who had sworn to an assault by A. B. on him) that it *did appear* (which was the suggestion in the libel) *from the testimony of every person in the room, &c. except the plaintiff*, that no violence had been used by A. B. &c.; for non-constat thereby that what the plaintiff swore was false. Neither is it sufficient in a justification to such a libel, where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial, &c.* and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles v. Nokes*, T. 46 G. 3. 231

LICENCE.

See COPYHOLD, 2.

- 1 A parol licence to put a sky-light over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a win-

dow,) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies as for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, E. 47 G. 3. 429

- 2 Such a parol licence is not within the statute of frauds. *ib.*

LICENCE TO OFFICIATE.

See MANDAMUS, No. 3, 6.

LIEN.

- 1 Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal in trover for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise, where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie v. Davis*, M. 46 G. 3. 11
- 2 Where no lien exists at common law, it can only arise by contract with the particular party, either express or implied: it may be implied either from previous dealings between the same parties upon the footing of such a lien, or even from a usage of the trade so general as that the jury must reasonably presume that the parties knew of and adopted it in their dealing. But where, as in the case of a common carrier claiming a lien for his general balance, such a lien is against the policy of the common law and the custom of the realm, which only gives him a lien for the carriage-price of the particular goods, there ought to be very strong evidence of a general usage of such a lien, to induce a jury to infer the knowledge and adoption of it by the particular parties in their contract: and the jury having negatived such a general usage, though proved to have been frequently exercised by the defendants and various other common carriers throughout the North for 10 or 12 years before, and in one instance so far back as 30 years, and not opposed by other evidence, the Court refused to grant a new trial. *Rushforth and others, Assignees of Rushforth, v. Hadfield and others*, H. 46 G. 3. 108

LIMITATION OF TIME for ascertaining a Right.

See WEIR, or ACTION ON THE CASE, No. 1.

LIVERPOOL Hackney Coaches.

See HORSE-DUTY, 2.

LONDON.

See COURT OF REQUESTS, 2. 4.

LONDON—Court of Requests.

It seems, that a *stock-broker* is liable to pay to the Chamberlain of London, for the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 Ann. c. 16. s. 4, to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the London Court of Requests, and that Court decline taking cognizance of the suit on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior courts, and that the judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the stat. of Ann. their Chamberlain is a trustee for the corporation, and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest. *The King v. The Commissioners of the City of London*, H. 46 G. 3. 139

LONDON—Court of Conscience.

- 1 Attornies, *plaintiffs*, are not within the London court of conscience act 39 & 40 G. 3. c. 104, compellable to sue there for a debt under 5*l.* at the peril of costs. *Board v. Parker*, M. 46 G. 3. 30
- 2 Neither are they, though the defendant were also an attorney. *Hodding v. Warand*, M. 46 G. 3. *ib.* 31

LOTTERY.

See CONVICTION, 3, 4.

MALT ACT.

See CONVICTION, No. 1, 2.

MANDAMUS.

See INSOLVENT DEBTORS, No. 2.

POOR-OVERSEERS, 4.

- 1 A mandamus to commissioners of bankrupt, to certify the bankrupt's conformity to the Lord Chancellor, refused. *In the Matter of John King*, M. 46 G. 3. 49
- 2 It seems, that a *stock-broker* is liable to pay to the Chamberlain of London, for

the benefit of the corporation, the annual duty of 40*s.* directed by stat. 6 Ann. c. 16. s. 4, to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the London Court of Requests, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l.* (the Court having jurisdiction only to the extent of 5*l.*) from the broker, upon which he might be sued in the superior Courts; and that the Judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the statute of Anne their Chamberlain is a trustee for the corporation; and a bond taken by them in their own name for securing the 40*s.* duty is no merger of the ordinary remedy given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered; though it did not appear that all of them had such interest. *The King v. The Commissioners of the London Court of Requests*, H. 46 G. 3.

- 3 In a writ of mandamus such facts should be alleged as are necessary to shew that the party applying for it is entitled to the relief prayed. Therefore where a mandamus to the ordinary to licence a curate or chaplain only stated that he had been *duly nominated and appointed by the inhabitants* of a township to be curate or chaplain of the church of P. without stating either the consent of the rector, or any endowment or custom for the inhabitants to make such nomination and appointment: the Court quashed the writ. *The King v. The Bishop of Oxford*, E. 46 G. 3. 163
- 4 Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits, until he paid a certain fine imposed by a by-law, with the breach of which he was charged; the Court refused a mandamus to restore him to his office; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal, or he were not guilty of a breach of it, or had been unlawfully suspended:) or considering the corporators as *partners* in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withheld from him. *The King v. The Company of Free Fishers and*

- Dredgers of Whitstable, Kent*, E. 46 G. 3. 167
- 5 Mandamus to the Commissary of the Bishop of Winchester, &c. to swear and admit one into the office of churchwarden by the inhabitants, &c. *vide* ELECTION.
- 6 A chapel in the township of P. was endowed in 1428, by a deed executed by the then impropietor of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them: under which deed they continued to exercise the power of appointment and presentation. In 1797, an act passed for inclosing open lands in the township, in which it is stated, as a matter of doubt, whether the curate were entitled to the small tithes or to a modus in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appoint and present a curate, upon an agreement signed by him and the principal inhabitants, wherein they state, that he is appointed to the curacy, &c. and to the money payment of 40*l.* 8*s.* 2*d.* annually payable out of the lands and hereditaments in P. in right of the said curacy, together with surplice fees and all other profits, privileges and appurtenances to the same belonging and of right payable: that the inhabitants considering that sum not sufficient for the proper support of the curate had voluntarily agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.* with a proviso that it "shall not in any respect alter the money-payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been TIME IMMEMORIAL charged in right of the said church." Held that this agreement, entered into for the purpose of restraining the then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void. And the right of presentation having thereupon devolved on the crown by stat. 31 Eliz. c. 6. s. 5, whose presentee had been licensed by the ordinary, a mandamus to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King v. The Bishop of Oxford*, T. 46 G. 3. 279
- 7 A defendant indicted here for misdemeanors committed by him in the *West Indies* in a public capacity under stat. 42 G. 3. c. 85, is not entitled under that statute upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the Court of B. R.; but he must lay before the Court such special grounds by affidavit as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose. *The King v. Jones*, M. 47 G. 3. 309
- 8 No mandamus lies to the archbishop of Canterbury to issue his fiat to the proper officer, &c. for the admission of a doctor of civil law, graduated at *Cambridge*, as an advocate of the Court of Arches. *The King v. The Archbishop of Canterbury*, H. 47 G. 3. 387
- 9 A charter having granted that upon the death or amotion of a principal Burgess (who is appointed to hold for life) it should be lawful for the mayor and the remaining principal burgesses within eight days next following, to elect another; the eight days after a vacancy having elapsed without an election, a mandamus was granted upon the stat. 11 G. 1. c. 4. s. 2, to make an election. *The King v. The Mayor, &c. of Thetford*, H. 47 G. 3. 412
- 10 If a presiding officer, who by the constitution of the borough forms an integral part of an elective assembly, depart from it after the meeting has been regularly formed, and the election entered upon, but before it is completed, an election made after his departure is void. *The King v. Buller*, E. 47 G. 3. 466
- 11 A mandamus lies to the ordinary to grant administration to a sole next of kin, or to one of the next of kin if there be several. *Rez v. The Inhabitants of Horsley*, E. 47 G. 3. 474
- MANOR.**
See **FINX**, 2.
- MASTER AND SERVANT.**
- The stat. 20 Geo. 2. c. 19, giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsmen, miners, potters, &c. "and other labourers," employed for any certain time, or in any other manner," respecting wages within certain sums, extends to *labourers of all descriptions*, and not merely in the particular trades or business there enumerated: and consequently includes wages earned by a *labourer*, who contracted to dig and stean a well for cattle, to be paid for by the foot, and who employed another to assist him in the work. *Louthier v. The Earl of Radnor*, M. 47 G. 3. 344
- MERGER.**
- It seems, that a *stock broker* is liable to

pay to the Chamberlain of *London*, for the benefit of the corporation, the annual duty of 40s. directed by stat. 6 Ann. c. 16. s. 4, to be received by the Chamberlain from every broker. But at all events, if the Chamberlain sue for such duty in the *London Court of Requests*, and that Court decline taking cognizance of the suit, on the ground that the corporation, for whose benefit the duty was to be received, had taken a bond in the penal sum of 10*l*. (the Court having jurisdiction only to the extent of 5*l*.) from the broker, upon which he might be sued in the superior courts; and that the judges of the Court of Requests were freemen of the corporation interested in the suit; this Court will grant a mandamus to the commissioners to proceed therein; for under the statute of Anne their Chamberlain is a *trustee* for the corporation; and a bond taken by them in their own name for securing the 40s. duty is no merger of the ordinary remedy given to their Chamberlain by the legislature. Neither is the right of the Chamberlain to sue in the Court of Requests, which has always been the practice, affected by the scintilla of interest which any of the commissioners might be supposed to have as corporators in the duty to be recovered, though it did not appear that all of them had such interest. *The King v. The Commissioners of the London Court of Requests*, H. 46 G. 3. 139

MIDDLESEX.

See COURT OF REQUESTS, 3.

MISDEMEANOR.

See INDICTMENT, 5. • MANDAMUS, 7.

MISDESCRIPTION of Lands in a Will.

See DEVISE, 9.

MISNOMER—Parish.

See POOR-REMOVAL, No. 2.

MORTGAGE.

- 1 Though a bill of sale for transferring the property in a ship by way of mortgage may be void, as such, for want of reciting the certificate of registry therein, as required by stat. 26 G. 3. c. 60. s. 17; yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the re-payment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 395
- 2 The devisee of the equity of redemption, (the legal fee being in a mortgage,) is not liable in covenant, as assignee of all the estate, right, title, and interest of the original covenantor. *The Mayor, &c. of Carlisle v. Blamire*, T. 47 G. 3. 510

NAVAL STORES.

One convicted upon the stat. 9 and 13 W. 3. c. 41. s. 2, of having unlawfully in his possession, or concealing, the king's naval stores, cannot since the stat. 39 & 40 Geo. 3. c. 89. s. 2, be sentenced to hard labour. *The King v. Bridges*, M. 41 G. 3. 318

NAVIGATION-LAWS.

See COLONIAL PRODUCE, or INSURANCE, No. 5.

NOTICE TO QUIT.

See EJECTMENT, No. 5.

See LANDLORD AND TENANT, 6, 8, 12.

NUISANCE.

See WEIR.

A parol licence to put a sky-light over the defendant's area, (which impeded the light and air from coming to the plaintiff's dwelling-house through a window,) cannot be recalled at pleasure after it has been executed at the defendant's expence; at least not without tendering the expences he had been put to: and therefore no action lies for a private nuisance, in stopping the light and air, &c. and communicating a stench from the defendant's premises to the plaintiff's house by means of such sky-light. *Winter v. Brockwell*, E. 47 G. 3. 429

OCCUPANT.

There can be no general occupancy of a copyhold, because the freehold is always in the lord; and the statutes 29 Car. 2. c. 3. s. 12, and 14 G. 2. c. 20. s. 9, appropriating estates *pur autre vie* where there is no special occupant, do not extend to copyholds. And one who was admitted tenant upon a claim as administrator *de bonis non* to the grantee of a copyhold *pur autre vie*, having no title in such character, cannot recover in ejectment by virtue of such admission as upon a new and substantive grant of the lord. *Zouch d. Forse v. Forse*, H. 46 G. 3. 91

OFFICE.

See SETTLEMENT—by Office.

Where a corporator, who was entitled to divide a certain share of the profits of a fishery, which the corporators worked and enjoyed in partnership, was *suspended* from the perception of his profits until he paid a certain fine imposed by a by-law, with the breach of which he was charged; the Court refused a mandamus to restore him to his office; he being still an officer, and having a remedy by an action for the tort against any who disturbed him in the lawful perception of his profits, (if the by-law were illegal, or he were not guilty of a breach of it, or had

been unlawfully suspended;) or, considering the corporators as *partners* in the fishery, he having a remedy in equity for his share of the partnership funds unjustly withholden from him. *The King v. The Company of Free Fishers and Dredgers of Whitstable, Kent*, E. 46 G. 3. 167

OFFICER.

See ESCAPE, 1.

One who was appointed collector of the Property-tax by the proper constituted authorities, and who considered himself, and was considered by the commissioners to be such collector, but whose appointment turned out to have been informally made, cannot be indicted at common law for the receipt of duties *by colour and pretence of being collector* of such duties; though the money were fraudulently collected and misapplied by him; because he was *in fact* appointed collector, and in that character received the money. And *quære*, whether the stat. 43 G. 3. c. 99. s. 19, having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any *penalty* other than such as by that and another act may be inflicted, does not take away the common law remedy by indictment for offences against the act. *The King v. Dobson and another*, H. 46 G. 3. 105

ORDER OF JUSTICES.

See BASTARDY, 1, 2. INSOLVENT DEBTORS, 4.

ORDER OF REMOVAL.

See POOR-REMOVAL.

OUTLAWRY.

See PLEADING, No. 1.

Upon the defendant's coming in to reverse an outlawry in a civil case, upon the stat. 4 & 5 W. & M. c. 18, the usual form for taking the recognizance of bail is to pay the condemnation-money; and not in the alternative, to pay it, or render the defendant. *Mathews v. Gibson*, T. 47 G. 3. 527

OVERSEER.

See POOR-OVERSEER.

OVERSEERS OF THE POOR.

See POOR, *Overseers of*.

OYER.

As by the practice of the Court they will not grant oyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad without oyer; the effect is to prevent such a plea from being pleaded;

and therefore if pleaded, the Court will quash it. *Deshons v. Head*, E. 46 G. 3. 183

PARISH.

See HUNDRED.

PARISH—Name.

See POOR-REMOVAL, No. 2.

PARISH OFFICE.

A certificate granted by a Judge at the assizes, upon the apprehension and conviction of a burglar, exempting the prosecutor and his assignee from "all and all manner of *parish* and ward offices," exempts the party from serving the office of *petty constable* for a township within, but not co-extensive with, the parish where the felony was committed, and for which the certificate was granted; to which office he was appointed at the court-leet of the manor co-extensive with such township. *Moseley, Bart. v. Stonehouse*, H. 46 G. 3. 86

PARISH OFFICERS.

See POOR—*Overseers of*.

PARTNERS.

1 *A., B., and C.*, traded under the firm of *A. and B.*, in the cotton business; *C.* not being known to the world as a partner; and *A. and B.* traded as partners alone under the same firm in the business of *grocers*; in which latter business they became indebted to *D.* and gave him their acceptance; which not being able to take up when due, they, in order to provide for it, indorsed in the common firm of *A. and B.* a bill of exchange to *D.*, which they had received in the cotton business in which *C.* was interested; but such indorsement was unknown to *C.*, of whom *D.* the indorsee had no knowledge at the time. Held that such indorsement in the firm common to both partnerships of a bill received by *A. and B.* in the cotton business bound *C.* their secret partner in that business; and that consequently *C.* was liable to be sued by *D.* on such indorsement; the latter not knowing of the misapplication of the partnership fund at the time. *Swan and others v. Steele, Clerk and Wood*, H. 46 G. 3. 102

PAYMENT OF DEBT.

Payment of the debt, without knowledge of an action then commenced or costs incurred, is no defence at the trial. *Toms v. Powell*, T. 46 G. 3. 251

PENAL ACTION.

Assuming it to be necessary in an action for a penalty by a common informer that the Court should refer to the statute *giv-*

ing the remedy, as well as to that creating the offence and giving the penalty; yet a count for a penalty on the stat. 5 Ann. c. 14, stating that the defendant had a snare to kill game against the form of the statute in such case made, &c., by reason whereof, and by force of the statute in such case made, &c. is sufficient; for the first statute mentioned refers to the 5 Ann. c. 14, creating the offence and giving the penalty; and the statute lastly mentioned refers to the 2 Geo. 3. c. 19, whereby the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *The Earl of Clanricarde v. Stokes*, T. 46 G. 3. 242

PENAL LAWS and PENALTIES.

See COMPOUNDING PENALTIES.

In an action on the stat. 2 & 3 Ed. 6. c. 13, for the treble value of tithe corn, omitted to be set out, it is not enough for the defendant to shew the existence, in fact, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity as well as existence of such a custom is properly triable in this form of action though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips v. Davies*, H. 47 G. 3. 372

PENALTY.

Quære, Whether the stat. 43 G. 3. c. 99. s. 19, having enacted that no collector, &c. employed in the execution of that act shall be liable by reason of such execution to any penalty other than such as by that another act may be inflicted, does not take away the common law remedy by indictment for offences against the acts. *The King v. Dobson*, H. 46 G. 3. 105

PLANTATIONS.

Colonial produce cannot legally be shipped from the *British West Indies* for *Gibraltar*, and therefore the same cannot be insured on such a voyage. And it matters not that part of the cargo was shipped at one *West India* island with liberty to exchange it at another, (which would have been legal,) if in fact it were not exchanged, and its ultimate destination was *Gibraltar*. And the ship and cargo being lost off *Gibraltar*, though the assured could not recover, yet the premium having been paid upon an illegal insurance could not be recovered back. *Lubbock v. Potts*, T. 46 G. 3. 212

PLEADING.

See WAY, 1, 2.

1 An allegation that a co-defendant was "by due course of law outlawed at the suit of the plaintiff in this plea and suit"
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is sufficient, without a *prout patet per recordum*. *Macmichael v. Johnson*, M. 46 G. 3. 31

2 It is a good plea to an action on a promissory note and for money lent, that the plaintiff is an uncertificated bankrupt, and that his assignees required the defendant to pay to them the money claimed by the plaintiff: and it is no good replication that the causes of action accrued after the plaintiff became bankrupt, and that the defendant treated with the plaintiff as a person capable of receiving credit in those behalves; and that the commissioners had made no new assignment of the said notes and money; for the general assignment of the commissioners passes to the assignees of the bankrupt all his after-acquired as well as present personal property and debts. *Kitchen v. Bartsch*, M. 46 G. 3. 33

3 To debt on a bail-bond, it is no good plea that the action was brought by the sheriff for the benefit of and as trustee for the sheriff's officer, who arrested the defendant, and to whom the defendant paid the debt and costs, &c. after the return day, but before the sheriff was ruled to return the writ, and who accepted the money so paid by the defendant (in full satisfaction and discharge of the bail-bond and fees, &c.); and that if any damage were afterwards incurred for default of the defendant's appearance according to the condition of the bond, it was occasioned by the default of such sheriff's officer in not paying over the debt and costs to the plaintiff in the original action, which would have been accepted by such plaintiff, &c. For it does not thereby appear that the sheriff's officer had either a legal or an equitable interest (even supposing the latter would have sufficed) in the bond at the time of the supposed satisfaction received by such officer; and supposing that accord and satisfaction could be pleaded to such a bond, not for money, but for a collateral act; and supposing that it could be so pleaded after the day stipulated for performance of the act. *Scholey and Domville v. Mearns*, H. 46 G. 3. 74

4 An averment in covenant that the covenant for renewal in the indenture declared on corresponded with various other leases, before then successively made by the owners of the inheritance for the time being, cannot be taken in aid to construe the meaning of the indenture; for supposing such evidence were admissible in any case where the renewals had been uniformly the same, yet non constat from this averment that all the former leases contained the same covenant for renewal. *Iggulden v. May*, H. 46 G. 3. 114

5 As by the practice of the court they will not grantoyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad

- without oyer ; the effect is to prevent such a plea from being pleaded ; and therefore if pleaded the court will quash it. *Deshons v. Head*, E. 46 G. 3. 183
- 6 It is not sufficient in justifying a libel (containing a highly coloured account of judicial proceedings, mixed with libellous insinuations and observations of the party himself) where the extraneous matter was so mingled with the judicial account as to make it uncertain whether it could be separated, to justify the publication by general reference to *such parts of the supposed libel as purport to contain an account of the trial, &c.*, and that the *said parts* contain a just and faithful account of the trial, &c. *Stiles v. Nokes*, T. 46 G. 3. 231
- 7 Assuming it to be necessary in an action for a penalty by a common informer that the count should refer to the statute giving the remedy, as well as to that creating the offence and giving the penalty ; yet a count for a penalty on the stat. 5 Ann. c. 14, stating that the defendant kept a snare to kill game, *against the form of the statute* in such case made, &c., by reason whereof, and by force of the statute in such case made, &c. an action hath accrued, &c. is sufficient. For the first statute mentioned refers to the 5 Ann. c. 14, creating the offence and giving the penalty ; and the statute lastly mentioned refers to the 2 Geo. 3. c. 19, whereby the whole penalty is given to the common informer, the half only of which had been given to him by an intervening statute. *The Earl of Clanricarde v. Stokes*, T. 46 G. 3. 242
- 8 Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of ; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff, the defendant promised to deliver to him another horse in lieu, &c. which should be worth 50*l.* and be a young horse ; and then alleged a breach in both those respects : held sufficient ; though the proof were not only of a promise that the second horse should be worth 50*l.* (which it was not) and be a young horse, but also of a warranty that it was sound and had never been in harness. *Miles v. Sheward*, M. 47 G. 3. 298
- 9 In covenant, breaches assigned generally against the defendant for having made cordage for *divers persons*, and for employing other persons than the plaintiffs to make cordage for his friends, &c. were held to be well assigned ; though no particular persons were named, nor the quantities or kinds of cordage mentioned &c. ; such facts lying more particularly within the defendant's knowledge. *Gale and Others v. Reed*, M. 47 G. 3. 330
- (And vide tit. COVENANT, No. 1.)
- 10 A defendant in an indictment for a misdemeanor cannot plead over to the charge after a plea in abatement for a misnomer, on which issue is taken and found against him. *The King v. Gibson*, M. 47 G. 3. 342
- 11 A plea of tender after the day of payment of a bill of exchange, and before action brought, is not good ; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the whole money then due, owing, or payable to the plaintiff in respect of the bill, with interest, from the time of the default, for the damages sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peplow*, H. 47 G. 3. 367
- 12 Qu. Whether a special plea in bar, stating no facts but what might have been proved under the general issue, but leaving other facts unanswered which the general plea would have put in issue, be good. *Boot v. Wilson*, E. 47 G. 3. 430
- 13 The defendant cannot justify an assault and false imprisonment of *A. B.* by shewing a latitat issued against *C. B.*, and averring that it was issued against *A. B.* by the name of *C. B.*, and that they are one and the same person ; there being no averment that *A. B.* was known as well by the name of *C. B.* *Shadgett v. Clipson*, E. 47 G. 3. 438
- 14 Partiality and improper conduct in an arbitrator, in making his award without hearing the defendant and his witnesses, cannot be pleaded in bar to an action on the bond, conditioned for the performance of the award ; but is only matter for application to the equitable jurisdiction of the Court to set aside the award. Neither can a parol agreement between the parties to waive and abandon the award be pleaded to such action. *Brad-dick v. Thompson*, E. 47 G. 3. 445
- 15 A defendant, in trespass, cannot justify, under the general issue, the cutting the posts and rails of the plaintiff, though erected upon the defendant's own land ; there being no question raised as to the property remaining in the plaintiff. *Welch v. Nash*, E. 47 G. 3. 469
- 16 In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer, with reference to which the words were spoken :) and then alleged that the defendant said of him, that he was *forsworn* ; innuendo, that the plaintiff had perjured himself in what he had sworn in his aforesaid answer to the bill so filed against him : held that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to

the answer averred in the prefatory part of the declaration to have been put in. *Hawkes v. Hapkey*, E. 47 G. 3. 483
 17 It is sufficient to state the substance of fines and recoveries in a special verdict, where the legal result only is material. *Goodright v. Forrester*, T. 47 G. 3. 539

PLEDGE.

Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal, in trover, for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *McCombie v. Davis*, M. 46 G. 3. 11

PLENE ADMINISTRATIVIT.

An executor administering, having once received money, assets of his testator, cannot discharge himself under the plea of plene administravit to an action by a bond creditor of his testator, by shewing that he paid the money over to his co-executor, even for the purpose of satisfying the bond creditor, who had applied for payment to such co-executor, if the co-executor afterwards misapplied the money by retaining it to satisfy his own simple contract debt. *Crosse et Uxor, Administratrix of Reeder, v. Smith and Munt, Executors of Grierson*, H. 46 G. 3. 118

POLICE-OFFICE.

See CONVICTION, 5.

POOR, OVERSEERS OF.

- 1 Though a parish had at no time antecedent to the years 1773-5 had the benefit of the stat. 43 Eliz. c. 2, but had always had five overseers of the poor appointed separately, two for one district, two for another, and one for the third; yet two of the districts having agreed in 1773 to act together, to which the third acceded in 1775, and there having been but four overseers since that period, who had been appointed for the whole parish: the Court held, that such agreement at the time, acted upon for 30 years past, was proper evidence for the jury to decide that the parish could in fact enjoy the benefit of the stat. 43 Eliz. and consequently that a distress levied for a poor rate made by the overseers conjointly appointed for the whole parish was legal. *Lane v. Cobham*, M. 46 G. 3. 9
- 2 Whether or not a parish can have the benefit of the stat. 43 Eliz. c. 2; by maintaining its poor with not more than four overseers, is a fact which the Sessions

ought to find, and should not leave to be presumed by the court from other conflicting evidence stated in a case reserved; such as that the parish had the benefit of the statute down to 1739, and from thence to 1753 it was uncertain how the poor were maintained there, and that from the latter period the poor had been maintained separately in six townships; but the population was decreased. *Rex v. Watson*, H. 46 G. 3. 104

POOR-OVERSEERS.

- 1 Where one of two churchwardens was also appointed overseer of the poor, a certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein: for the certificate act 8 & 9 W. 3. c. 30, requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *The King v. The Inhabitants of St. Margaret, Leicester*, E. 47 G. 3. 440
- 2 Although a parish might not have had the benefit of the statute 43 Eliz. c. 2, before and at the passing of the stat. 13 & 14 Car. 2. c. 12; but perhaps at that period, and certainly for a long course of years antecedent to the year 1773-5 maintained its poor in separate districts, yet it was competent to the parishioners at the latter period to cease acting under the statute of Car. 2, and to recur to the general provision of the stat. 43 Eliz. by maintaining their poor as one entire parish; and having so done from the year 1775, the Court refused a mandamus to the justices of peace to appoint separate overseers as before that time. *The King v. Palmer*, E. 47 G. 3. 479

POOR RATE.

See POOR, OVERSEERS OF.

- 1 Where a coal-mine becoming unproductive ceases to be worked, the lessee is no longer liable to be rated for it to the relief of the poor, although he be still bound by his covenant to pay the rent reserved to his landlord. *Aliter*, where the mine is itself productive, although it be worked to a loss by the lessee, after deducting the proportion of the gross value of the produce reserved to the owner. *The King v. The Inhabitants of Bedworth*, E. 47 G. 3. 465
- 2 The owners of the packet-boats employed under a personal contract with the post-masters in carrying the mails, &c. between *Holyhead* and *Dublin*, are liable, in respect of the profits accruing to them from the carriage of passengers and luggage in such boats, to be rated for the same in the parish of *Holyhead* where

such owners reside, and from and to which the boats sail, where they are repaired, and where the passage-money is in part receivable and is collected; though they are registered in another place. The King v. Jones, T. 47 G. 3. 494

3 But in order to rate a person for personal property producing profit in a parish, not only the property must be within the parish at the time of making the rate, but the owner must come within the description of an inhabitant of such parish. *Rez v. Liverpool Parish, H. 38 G. 3. Rez v. Collison and Taylor, E. 43 G. 3, and Rez v. Howard, M. 44 G. 3. B. R. cited in Rez v. Jones.* 496, 7, n.

4 Where the farmer is rated for the whole farm, it is no ground of objection to the rate by a third person, that a dairyman who rented under the farmer his stock of cows to be depastured on the same land, was not rated for such dairy; although it were stated in the case that the dairyman made a profit of the produce of the cows, independent of the profits made by the farmer. For though such a taking of a dairy be a taking of a tenement in law, which will confer a settlement, yet that is in respect of the interest in the land; and the rate upon the farmer, for the whole farm, includes all the profit of the land and the stock appertaining to it; or considering the cows as personal stock distinct from the land, they are the personal stock or capital of the farmer, not of the dairyman; and the latter only makes his profit by his labour out of the capital stock of another. *The King v. Brown, T. 47 G. 3.* 528

5 The occupier of a clay-pit is rateable for the same. *ib.*

6 Silk throwsters, working up in their mills the silk of their employers sent to them for that purpose, are not liable to be rated in that respect, as for their stock in trade. *The King v. The Inhabitants of Sherborne, T. 47 G. 3.* 532

POOR-REMOVAL.

See APPEAL.

1 An order of removal of *J. S.* and *B.* his wife, made upon the examination of the wife adjudging that they lately came into the parish of *K.* and are likely to become chargeable to it, and were last legally settled in *M.*, is good upon the face of it, and conclusive upon the parish of *M.* as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as *B. S., single woman*, from *M.* to *B.*, *M.* cannot shew in evidence that the marriage was null and void. *The King v. The Inhabitants of Binegar, E. 46 G. 3.* 180

2 An order of removal, directed to "the parish of *Poole*, or town and county of *Poole*," is sufficient; though the proper name of the parish be *St. James in Poole*; there being no other parish in the town

and county of *Poole*. *The King v. The Inhabitants of Topsham, T. 46 G. 3.* 219

POST-HORSE DUTY.

See HORSE DUTY.

POWER.

See TRUST AND TRUSTEES.

See EVIDENCE, No. 7.

Under a devise to *A.* for life, remainder to trustees, &c., remainder to the use of the issue of the body of *A.*, "in such parts, shares, and proportions, manner and form as she should appoint;" remainder, in default of appointment, to the use of all and every the children of *A.* and their heirs, &c. *A.* has a power of appointing to all or any of her children in fee, and is not restrained to appoint to them in tail only. *Rez v. The Marquis of Stafford and others, T. 46 G. 3.* 244

PRACTICE.

See AFFIDAVIT TO HOLD TO BAIL. BAIL. COURT OF REQUESTS. COSTS.

1 Though a writ of error abate by the death of the plaintiff in error before it be returned and certified, yet execution cannot afterwards be issued on the judgment without leave of the Court; and the Court refused leave for the plaintiff here to issue a testatum *fi. fa.* tested in the last term on the return day of the original *fi. fa.*, which was after the allowance and service of the writ of error. *Lord Kinnaird and others v. Lyall, H. 46 G. 3.* 141

2 A defendant superseded for want of being charged in execution within two terms after judgment, cannot be again arrested and taken in execution upon the same judgment: aliter, if superseded for want of proceedings in time before judgment. *Line v. Lowe, H. 46 G. 3.* 156

3 It is sufficient in a *qui tam* action to entitle the plea with the names of the parties, without the addition of *qui tam*, &c. to the plaintiff's name. *Dule, qui tam, v. Beer, H. 46 G. 3.* 157

4 The Court will not, after a trial, stay proceedings in ejectment on payment of the rent, &c., the stat. 4 G. 2. c. 28, only warranting such application before trial. And that statute is not confined to cases of ejectment brought after half a year's rent due where no sufficient distress was to be found on the premises. *Roe d. West v. Davis, E. 46 G. 3.* 173

5 As by the practice of the Court they will not grantoyer of an original writ, and yet a plea in abatement for want of an addition to the defendant in such writ is bad withoutoyer; the effect is to prevent such a plea from being pleaded; and therefore if pleaded, the Court will quash it. *Deshons v. Head, E. 46 G. 3.* 183

6 The defendant, a seaman, being out upon

- bail on process for a debt under 20l., was impressed into the King's service; and as he would have been entitled to his discharge, if in custody by virtue of the stat. 32 G. 3. c. 33. s. 22, the Court, on application of the bail, ordered an exoneretur to be entered on the bail-piece in the first instance. *Robertson v. Patterson*, T. 46 G. 3. 193
- 7 The Court will discharge a married woman on filing common bail, who was sued for goods sold and delivered to her by the plaintiff; knowing at the same time that she was a married woman, though living apart from her husband with a separate maintenance. *Wardell v. Gooch*, T. 46 G. 3. 272
- 8 After default made in not putting in special bail in time, it is not enough that bail are afterwards put in; but the plaintiff may take an assignment of the bail-bond and proceed thereon, unless the bail be also justified, though not before excepted to. *Turner v. Cary and others*, T. 46 G. 3. 283
- 9 Where parties by bond agreed to submit matters in difference between them to arbitration, and that the submission should be made a rule of court, it is competent to either, even since the st. 9 & 10 W. 3. c. 15, to revoke by deed his submission, and notify the same to the arbitrators before the authority be executed; and he cannot be attached for a contempt of court, if after such revocation and notice the arbitrators make an award, and the submission be made a rule of court. But it seems, that it would be a contempt to revoke the submission after it had been made a rule of court. *Milne and others, Assignees of Rhodes and Justamond, Bankrupts, v. Gratrix*, T. 46 G. 3. 283
- 10 Where the debt was paid after an alias pluries writ issued, the defendant cannot object at the trial that the latitat was not returned; for at any rate, if the alias pluries were the commencement of the action, it is only an irregularity, which, though a ground for application to the Court to set aside the proceedings, yet, having been once waived, cannot afterwards be objected to. Neither can it be objected at the trial that when the debt was paid the defendant had no notice of any action commenced or costs incurred. *Toms v. Powell*, T. 46 G. 3. 251
- 11 The plaintiff is not bound to notice an order for time to plead obtained by the defendant, if it be not drawn up and served; but may sign judgment as for want of a plea after the time when the defendant would have been bound to plead if no such order had been made. *Sedgewick v. Allerton*, T. 46 G. 3. 254
- 12 One who was residing at an hotel in London from the time of his arrest till he was served with notice of executing the writ of enquiry was holden not entitled to more than eight days notice in a town cause, though his general residence (his home) was above 40 miles from town. *Lloyd v. Hooper*, T. 46 G. 3. 290
- 13 A defendant indicted here for misdemeanors committed by him in the *West Indies* in a public capacity under stat. 42 G. 3. c. 85, is not entitled under that statute, upon an affidavit in the common form for putting off a trial upon the absence of a material witness, to put off his trial till return made to writs of mandamus to the courts, &c. abroad, to examine witnesses; which are directed to be issued in such cases at the discretion of the Court of B. R.; but he must lay before the Court such special grounds by affidavit, as may reasonably induce them to think that the witnesses sought to be examined are material to his defence. But the prosecutor in such case is of course entitled to writs of mandamus for the like purpose. *The King v. Jones*, M. 47 G. 3. 309
- 14 The court will not compel an attorney, upon a summary application, to deliver up, on payment of his demand, a lease put into his hands for the purpose of making an assignment of it; there being no cause in Court, nor any criminal conduct imputed to him in respect of it. *In the matter of S. Lowe*, H. 47 G. 3. 397
- 15 A writ of error upon a judgment in debt on a recognizance of bail is a stay of execution; not being within the exception of the stat. 3 Jac. 1. c. 8, either as a judgment upon an obligation conditioned for payment of money only; (the recognizance being to pay money or do something else;) or as a judgment upon a contract, which is there used in contradistinction to an obligation. *Dell v. Wild*, H. 47 G. 3. 399
- 16 In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid. *Hodinott v. Coz*, H. 47 G. 3. 411
- 17 Upon an indictment for perjury removed into B. R. by certiorari, if the prosecutor give notice of trial to the defendant, and withdraw his record without countermanding his notice in time, he shall pay costs to the defendant. *The King v. Bartrum*, H. 47 G. 3. 411
- 18 After verdict in ejectment for a message and tenement, the Court will give leave to enter a verdict, according to the Judge's notes, for the message only, (pending a rule to arrest the judgment,) without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway*, E. 47 G. 3. 451
- 19 The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only at-

taches on the general result of the costs, &c. of the cause. *Howell v. Harding*, E. 47 G. 3. 454

20 Where a first writ of error abates, or is put an end to by the act of the plaintiff in error, a second writ of error brought in the same court is not a supersedeas of execution, as the first is: and execution may then be sued out without leave of the Court. But in error of matter of fact coram vobis, which is not within the statutes requiring bail in error, the writ of error is or is not a supersedeas according to circumstances; and the Court must be moved for leave to sue out execution pending it. *Birch v. Tristie*, E. 47 G. 3. 477

21 The time limited by the stat. 9 and 10 W. 3. c. 15 s. 2, for setting aside awards, made under submissions by virtue of that statute, does not attach on awards made under orders of nisi prius. *Synge v. Servoise*, T. 47 G. 3. 501

22 The sheriff cannot be ruled to bring in the body until the time for putting in bail has expired. *The King v. The Sheriff of Middlesex*, T. 47 G. 3. 526

23 Upon the defendant's coming in to reverse an outlawry in a civil case upon the stat. 4 and 5 W. & M. c. 18, the usual form for taking the recognizance of bail is to pay the condemnation money: and not in the alternative to pay it, or render the defendant. *Mathews v. Gibson*, T. 47 G. 3. 527

24 Service of notice of plea filed on a Sunday is void, by construction of the stat. 39 Car. 2. c. 7. s. 6, which avoids all process, &c. served on that day. *Roberts v. Monkhouse*, T. 47 G. 3. 536

PRESSING.

See SHAMEN, 1.

PRESUMPTION.

See CONVICTION, No. 1. **WEIR.**

The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him for the last 12 years, was properly stamped in proportion to the apprentice fee of 12l. received by the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in the office that any such indenture had been stamped or inrolled during that period; and the judgment of the justices was confirmed in *B. R. The King v. The Inhabitants of Long Buckby*, M. 46 G. 3. 29

PRIZE.

A flag officer at the *Cape of Good Hope*

sends a ship of his squadron within the limits of another flag officer's command in the *Asiatic seas*, for the special purpose of getting her repaired; and after the ship's going there and completing her repairs in the manner directed by the latter officer, and receiving an order from him to convoy certain ships on her return to her former station; while executing such order, being accidentally separated from her convoy, took a prize within the limits of the flag officer's command in the *Asiatic seas*, but in the course of rejoining her original flag officer at the *Cape*: held that the latter was not entitled to the flag officer's 1-8th share of the prize: his command over the ship being suspended while she was out of the limits of his own, and within the limits of another command. *Holmes v. Rainier*, T. 47 G. 3. 516

PROMOTIONS.

1 The Hon. *Thomas Erskine* made Lord High Chancellor, and created a peer by the title of Lord *Erskine*, &c. H. 46 G. 3. 158

2 *Arthur Piggott* Esq. made Attorney-General, and knighted. *ib.*

3 *Samuel Romilly* Esq. made Solicitor-General, and knighted. *ib.*

4 *Mr. Jervis* made King's Counsel. *ib.*

5 Serjts. *Lens* and *Best* made King's Serjeants, E. 46 G. 3. 159

6 *Mr. Hargrave* made King's Counsel. *ib.*

7 *Mr. Dauncey* had a Patent of Precedence. *ib.*

8 *Mr. Thompson*, *Mr. Hart*, *Mr. Martin*, and *Mr. Leach*, were made King's Counsel in H. 47 G. 3. 423

9 Lord *Erskine* resigned the Great-Seal, which was re-delivered to *Ld. Eldon*, E. 47 G. 3. 424

10 *Sir V. Gibbs* succeeded *Sir A. Piggott* as Attorney-General; and *Sir T. Plumer* succeeded *Sir S. Romilly* as Solicitor-General. *ib.*

11 *Mr. Morris* was made a Master in Chancery in the room of *Sir W. W. Pepys*, Bart. who resigned. *ib.*

12 The Honourable *S. Percival* was appointed Chancellor of the Exchequer, and of the Dutchy of Lancaster. *ib.*

13 *Mr. Baron Sutton* received the *Irish Great-Seal*, and was created Lord *Manners of Foston*. *ib.*

14 *Mr. Wood* was made a Baron of the Exchequer, and knighted. *ib.*

PROPERTY TAX.

See INDICTMENT, No. 1.

PUBLICATION.

See EVIDENCE, No. 1.

QUI TAM.

It is sufficient in a *qui tam* action to entitle the plea with the names of the parties,

without the addition of *qui tam*, &c. to the plaintiff's name. *Dale, qui tam v. Beer*, H. 46 G. 3. 157

RATE—Poor.

See POOR, OVERSEERS OF.

REASONABLE TIME.

What is such is a question of law to be left to the jury under the circumstances. *Anderson v. The Royal Exchange Assurance Company*, M. 46 G. 3. 26

RECOVERY in former Action.

See ASSUMPSIT, 10.

REMOVAL, ORDER OF.

See POOR-REMOVAL.

RENT.

See LANDLORD and TENANT, 10, 12.

RE-ENTRY.

See LANDLORD and TENANT, 7.

REGISTRY OF SHIPS.

See SHIP.

REMAINDER.

See FINE, 1.

REVENUE.

See HORSE DUTY.

REVOCATION, DEED OF.

See AWARD, No. 2.

RIVER.

See WEIR.

SAINT ALBANS Paving, &c. Act.

See APPEAL, 2, 3. INDICTMENT, 2, 3, 4.

SALE.

See SHIP, 1. OF VENDOR AND VENDEE, 1.

SALVAGE.

See INSURANCE, No. 1.

The commander of a stranded vessel having by the recommendation of the pilot, who came to his assistance, sent to the defendant on shore, till then a stranger to him, to send all the help which was necessary; which he accordingly did; and under his direction (but also under the inspection of custom-house officers attending) the goods were brought on shore and housed under the joint locks of himself and the collector of the customs; and he paid all the salvors; held that this constituted him the agent of the owners, and took the case out of the statute 12 Ann. st. 2. c. 18. s. 2, for regulating the quantum of salvage by the award of three justices of peace; which

statute only applies to cases where application is made by the owners, &c. to certain public officers named, and the salvage is made under their orders. *Baring v. Day*, M. 47 G. 3. 320

SALE OF GOODS—By Sample.

Sugars which were in the king's warehouse, under the locks of the king and the owner, from whence they could not be removed till the duties were paid, were advertised for sale by auction on the 20th September, when samples of half a pound weight from each hogshead, drawn after the sugars had been weighed and the duties ascertained at the king's beam, were produced to the bidders assembled; and the auctioneer, (having then before him the printed catalogue of sale, containing the lots, marks, and number of hogsheads, and the gross weight of the sugars, and also another written paper containing the conditions of sale, which latter he read to the bidders, as the conditions on which the sugars mentioned in the catalogue were to be sold; but the two papers were neither externally annexed, nor contained any internal reference to each other,) wrote down on the catalogue the name of the highest bidder and the sum bid for the particular lots; having first informed the bidders that the duties were not then paid, but would be paid on the morrow by the seller, and after the biddings closed the samples were delivered to and accepted by the purchaser, according to the usual practice at such sales, as part of his purchase, to make up the quantity marked as weighed at the king's beam. And a fire having consumed the sugars on the 22d of September, before the duties could be paid, and without the default of the seller: held,

1st, That at common law this was a sale to change the property at the time and place of auction, though the goods could not be delivered till the duties were paid, which was known at the time: such being the manifest intent of the contracting parties: and consequently that the loss must fall upon the buyer.

2dly, That assuming a sale of goods by auction to be within the 17th section of the statute of frauds, 29 Car. 2. c. 3, (which, whether it were or not was not now necessary to be decided,) and therefore requiring to be evidenced by a memorandum in writing of the bargain, signed by the party to be charged or his authorised agent, except where the buyer shall receive part of the goods sold; yet here the delivery to and acceptance of the samples by the buyer: which delivery was made as part of the thing purchased, and upon which the duties were paid; at any rate took the case out of the statute.

3dly, It seems that taking sales of goods by auction to be within the 17th

section of the statute, the auctioneer or broker, who is a middle-man, must be taken to be the agent of both parties, so as to bind the purchaser by his signature. *Hinde v. Whitehouse and Galan*, T. 46 G. 3. 261

SAMPLE, SALE BY.

See SALE OF GOODS.

SEAMAN.

See BAIL, No. 1.

- 1 Where application had been made for the discharge of an impressed seaman before the two years of his protection by the stat. 13 Geo. 2. c. 17, were expired; which was then ineffectual, because the facts were not verified with sufficient certainty; yet the doubt being now removed by another affidavit, the Court granted a writ of habeas corpus for the purpose of liberating him, though the two years were now expired. *Ex parte Bruce*, M. 47 G. 3. 307
- 2 Seamen enter into articles to serve for monthly wages on board a ship "bound for the ports of *Madeira*, any of the *West India* islands, and *Jamaica*, and to return to *London*:" and it is agreed that they shall not demand or be entitled to their wages, or any part thereof, until the arrival of the ship at the port of discharge, &c. (meaning *London*;) held that though the ship earned freight upon the delivery of an outward bound cargo at *Madeira*, and of another cargo taken in at *Madeira* and delivered in the *West Indies*; yet that being lost in her passage home in a storm, the seamen could not recover wages pro rata upon the outward voyage, by reason of the express terms of the stipulation respecting wages. *Appleby v. Dods*, E. 47 G. 3. 425

SESSIONS.

See APPEAL.

See EVIDENCE, No. 5.

SETTLEMENT—By Apprenticeship.

- 1 The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and when the parish in which he was settled under such indenture had relieved him the last 12 years, was properly stamped in proportion to the apprentice fee of 12*l.* received by the master: although the deputy registrar and comptroller of the stamp-duties proved that it did not appear in the office that any such indenture had been stamped or enrolled during that period. And the judgment of the justices was confirmed in *B. R.* *The King v. The Inhabitants of Long Buckby*, M. 46 G. 3. 29

- 2 The residence of an apprentice with his grandmother in a different parish from his master on account of illness, though with the consent of the master, is not referable to the apprenticeship, so as to gain him a settlement in such third parish. *The King v. The Inhabitants of Barmby-in-the-Marsh*, E. 46 G. 3. 182
- 3 An apprentice to a ship-owner living at *A.* gains a settlement by residing on board his master's ship for 40 days in *B.*, while the ship was staying and trading there in the course of his master's trade and employ, upon a coasting voyage. And if the apprentice afterwards, upon the bankruptcy of his master, return to *A.* where he formerly resided with his master as at his home, and finding that his master had absconded, live there with a relation, without doing any further service there for his master; such residence, though for more than 40 days before his apprenticeship expired, will not regain him a settlement in *A.* *The King v. The Inhabitants of Topsham*, T. 46 G. 3. 219
- 4 Where the master and the father of a boy agreed, under seal, that the master should teach the son the art and mystery of weaving for five years, and find utensils, and that the son should receive half his earning, and the master the other half; under which the boy served out the time as an apprentice: held that this agreement between the father and master (to which the son was no party) not binding the son, or the father for him, to any service to the master; but the son's service in fact being merely voluntary; was no apprenticeship in point of law; and consequently no settlement could be gained by the son serving his master under such a contract. *The King v. The Inhabitants of Cromford*, M. 47 G. 3. 306

SETTLEMENT—Certificate.

Where one of two churchwardens was also appointed overseer of the poor, a certificate of settlement signed by both is a nullity, and does not prevent an apprentice serving the certificated man in the certificated parish from gaining a settlement therein; for the certificate act 8 & 9 W. 3. c. 30, requires the certificate to be under the hands and seals of the churchwardens and overseers, or the major part of them, or of the overseers where there are no churchwardens; and there must be at least two overseers at the time. *The King v. The Inhabitants of St. Margaret, Leicester*, E. 47 G. 3. 440

SETTLEMENT—by Estate.

A sole next of kin has such an equitable interest in a leasehold tenement of the intestate, that she gains a settlement by residing 40 days in the same parish after the intestate's death, before administration granted to her. And it matters not that the widow of the intestate survived

him, if she died afterwards without having taken out letters of administration, leaving the other sole next of kin to the intestate. But no settlement is gained by the mere relation back to the death of the intestate of the letters of administration when granted, taken out only 18 days before the next of kin parted with her interest in the leasehold ; so as to connect a residence of those 18 days with a residence by such next of kin in the same parish for more than 40 days, after the death of the intestate and his widow, before such administration granted. *The King v. The Inhabitants of Horsley*, E. 47 G. 3. 474

SETTLEMENT—Evidence of.

- 1 Giving parish relief to a pauper within the parish is no evidence of his settlement there. In the instance in question the relief was administered at one time for a fortnight, and at another time for a longer period in the parish workhouse. *The King v. The Inhabitants of Chatham*, T. 47 G. 3. 515
- 2 Hearsay evidence of the declaration of a deceased father as to the place of birth of his bastard child is not admissible to prove the birth settlement of such child. *The King v. The Inhabitants of Erith*, T. 47 G. 3. 532

SETTLEMENT—By Hiring and Service.

- 1 A pauper placed by the parish with a parishioner, upon an agreement between the latter and the parish officers to find board, washing, and lodging for the pauper at 2s. 6d. per week, and that the pauper was to do what he was set about, does not constitute the relation of master and servant between such parishioner and the pauper, so as to enable the latter to gain a settlement as by hiring and service. Neither does such relation arise by implication from a continuance of services to the parishioner by the pauper who continued to live with him as before, after the parish had refused any longer to continue the parochial allowance; and the pauper, who was a *Greenwich* pensioner, going there twice a year without asking or receiving the leave of the parishioner; the latter, however, not refusing leave when informed of the other's going. *The King v. The Inhabitants of Rickinghall Inferior*, E. 46 G. 3. 178
- 2 The pauper desired her mother to look out for a place for her; and the mistress on the application of the mother some time before *Old Michaelmas*, said that she would give the pauper the same wages as her other servants, and wait till she came; but the mother made no absolute agreement for her daughter; though she informed her that she had got a place for her, if she liked it. About a week after *Old Michaelmas*, the mistress applied to the pauper to know if she liked to come

into her service, and they then agreed for the first time for certain yearly wages, (the same as the other servants,) with liberty of parting at a month's wages or warning. Held, that the hiring commenced only from the day when the pauper and her mistress agreed on the terms specified, and not from *Old Michaelmas* or before, when the mother spoke to the mistress. And the pauper having given a month's previous notice to quit at *Old Michaelmas-day*; which the mistress accepted, and procured another servant to come on that day; when the pauper received her whole year's wages; but upon the mistress telling her that she wanted a week of serving out her year, she offered to stay another week; to which the mistress said that it did not signify, as she had got another servant in her place: held, that this was a dissolution of the contract before the end of the year, by the notice to quit given and accepted; and not a mere dispensation of the service; and consequently no settlement was gained by such hiring and service. *The King v. The Inhabitants of Rushall*, T. 46 G. 3. 223

- 3 Five days before the end of the year a servant absented himself by leave one day from his master's service to look out for another place; and on his return the master on some trivial pretence said he should not stay any longer in his service, and offered him a trifle less than his whole wages, which the servant refused; but was then ready to have accepted his whole wages; though he would rather have staid out his year; and immediately he applied to a magistrate to oblige his master either to pay him the whole or to receive him into his service for the remainder of the year; when the magistrate ordered half a crown to be deducted; and the servant thereupon hired himself to another master, before his first year was out; and after the year received from his first master his whole wages. Held, that this was a dissolution of the contract before the end of the year by mutual consent, signified on the part of the servant by his entering into another service. *The King v. The Inhabitants of Leigh*, T. 46 G. 3. 252

SETTLEMENT—By Marriage.

An order of removal of J. S. and B. his wife, made upon the examination of the wife, adjudging that they lately came into the parish of K., and are likely to become chargeable to it, and were last legally settled in M., is good upon the face of it, and conclusive upon the parish of M. as to the marriage and settlement of the husband and wife; so that upon a subsequent removal of the wife, describing her as B. S. single woman from M. to B., M. cannot shew in evidence that the marriage was null and void. *The King*

v. The Inhabitants of Binegar, E. 46 G. 3. 180

SETTLEMENT—By Office.

The appointment of a master of a work-house by the parish officers and vestry, pursuant to the stat. 9 G. 1. c. 7, which enables the parish officers and parishioners, &c. to contract with any person for the management of the poor in the work-house, (and who did contract with the pauper to manage the poor in the work-house, and teach the children to spin, &c. at a yearly salary; and after some years service dismissed him at a quarter's notice,) is not a *public annual office or charge* within the statute 3 W. & M. c. 11. s. 6, the executing of which for a year will confer a settlement. *The King v. The Inhabitants of Mersham*, H. 46 G. 3. 83

SETTLEMENT—by Rating.

A custom-house officer who was rated for his salary towards the land-tax, and in fact paid the rate himself, though the money was either given to him beforehand for the purpose, or allowed to him afterwards by the collector, gains a settlement in the parish in which he is so rated and pays. *The King v. The Inhabitants of Armouth*, E. 47 G. 3. 464

SET OFF.

The plaintiff is entitled to set off interlocutory costs in the same cause, payable by him to the defendant, against the debt and costs recovered by him on the final result of the cause; notwithstanding the objection of the defendant's attorney on the ground of his lien, which only attaches on the general result of the costs, &c. of the cause. *Howell v. Harding*, E. 47 G. 3. 454

SEWERS.

By stat. 23 H. 8. c. 5, the jury by whom a presentment is made to commissioners of sewers, concerning what lands are within a level and subject to a certain rate, ought to be summoned by the sheriff from the body of the country, in pursuance of a precept directed to him from the commissioners for that purpose. And a presentment made by a standing jury, constituted according to ancient usage, originally returned by the sheriff, at the commencement of every new commission of sewers, from certain parishes or districts, composed of land owners there, interested in disclaiming the general charges of the level, which jurymen acted for life, unless removed for cause, and only the foreman of whom was summoned by the sheriff on the particular occasion, which foreman thereupon convened the other jurymen: is illegal and void and the want of jurisdiction of such presenting jury cannot be waved by travers-

ing their presentment and going to trial before another jury properly returned from the body of the country, by whom such presentment was confirmed. The presenting jury, after being sworn and charged, must also prosecute their inquiry upon hearing evidence on oath before the commissioners *in curia*, and make their presentment thereon, and not upon information collected in *pais*, without oath. *The King v. The Commissioners of Sewers for the County of Somerset*, M. 46 G. 3. 40

SHERIFFS.

See BAIL-BOND.

SHIP.

- 1 Where the legal title to a ship remained for a month after the sale in the vendors, upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 68. s. 15; yet the vendors are not liable during that interval for repairs ordered by the captain, under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them. *Young v. Brander*, M. 47 G. 3. 299
- 2 Though a bill of sale for transferring the property in a ship by way of mortgage may be void as such for want of reciting the certificate of registry therein, as required by stat. 26 Geo. 3. c. 60. s. 17, yet the mortgagor may be sued upon his personal covenant contained in the same instrument for the repayment of the money lent. *Kerrison v. Cole*, H. 47 G. 3. 395
- 3 The stat. 34 G. 3. c. 68. s. 15, reciting that by the laws in force, upon any alteration of property in any vessel in the same port to which she belongs, an indorsement on the certificate of registry is required to be made; enacts that such indorsement shall be made in the form therein expressed, and shall be signed by the vendor, &c. and a copy of such indorsement shall be delivered to the registering officer; or otherwise the sale shall be utterly null and void; and such officer is required to make entries thereof on the affidavit on which the original certificate was obtained, and in the book of registry, and to give notice thereof to the commissioners of customs. Then s. 16, provides that if any vessel shall be at sea, or absent from the port to which she belongs when such alteration in the property shall be made; so that an indorsement on the certificate cannot be made; (assuming that the certificate is always with the ship;) then it substitutes a bill of sale to be made in lieu of the indorsement on the

certificate; requiring the same delivery of a copy, and the same entries and notice thereof as were required for the indorsement of the certificate by the prior section; but that within ten days after the vessel's return to her port, the indorsement on the certificate, &c. shall be made; as before required. Held that the provisions of the two sections comprehend every transfer of property in a ship; and that a bill of sale executed by a sole owner of a vessel belonging to the port of *Sunderland* to a vendee residing in *London*, at a time when the vessel was in the port of *London*, was void, for want of complying with the requisites of one or other of those sections; neither of them having been complied with: and that it was not sufficient for the vendee to have complied with the requisites of the stat. 7 & 8 W. 3. c. 22. s. 21, which requires a registry de novo upon any transfer of property to another port, and that the former certificate shall be delivered up to be cancelled. *Hayton v. Jackson*, T. 47 G. 3. 520

SIMONY.

A chapel in the township of *P.* was endowed in 1428 by a deed executed by the then impropriator of the rectory, the then vicar, and the inhabitants of the township, and confirmed by the diocesan; whereby in consideration of a yearly payment to the vicar, it was provided that the curate of the chapel should receive all the tithes due to the vicar from the said inhabitants, and should be appointed by them; under which deed they continued to exercise the power of appointment and presentation. In 1797 an act passed for inclosing open lands in the township, in which it is stated, as a matter of doubt, whether the curate were entitled to the small tithes or to a modus in lieu of tithes, the decision of which is left untouched by the act. In 1801, upon a vacancy, the inhabitants appointed and presented a curate upon an agreement signed by him and the principal inhabitants, wherein they state that he is appointed to the curacy, &c. and to the money payment of 40*l.* 8*s.* 2*d.* annually payable out of the lands and hereditaments in *P.* in right of the said curacy, together with surplice fees, and all other profits, privileges, and appurtenances to the same belonging and of right payable. That the inhabitants considering that sum not sufficient for the proper support of the curate had voluntarily agreed with him to pay a further annual sum of 29*l.* 11*s.* 10*d.*, with a proviso that it "shall not in any respect alter the money payment of 40*l.* 8*s.* 2*d.* wherewith the said lands are and have been TIME IMMEMORIAL charged in right of the said church." Held that this agreement, entered into for the purpose of restraining the

then curate from asserting his claim to the small tithes by due course of law, and furnishing evidence against his successors, was *simoniacal*, and the presentation made thereon void; and the right of presentation having thereupon devolved on the crown by stat. 31 Eliz. c. 6. s. 5, whose presentee had been licensed by the ordinary, a mandamus to the ordinary to license another curate subsequently appointed and presented by the inhabitants, who had given notice of having withdrawn their former nomination and presentment, and cancelled the agreement, was denied; and the rule was discharged with costs. *The King v. The Bishop of Oxford*, T. 46 G. 3. 279

SLANDER.

- 1 Where special damage is necessary to sustain an action for slander, it is not sufficient to prove a mere wrongful act of a third person induced by the slander, such as that he dismissed the plaintiff from his employ before the end of the term for which they had contracted; but the special damage must be a legal and natural consequence of the slander. *Vicars v. Wilcox*, M. 47 G. 3. 295
- 2 In slander the plaintiff averred that he had in due manner put in his answer on oath to a bill filed against him in the Court of Exchequer by the defendant, (but did not proceed to aver any colloquium respecting that answer with reference to which the words were spoken;) and then alleged that the defendant said of him that he was *forsoorn*; innuendo, that the plaintiff had *perjured* himself in what he had sworn in his aforesaid answer to the bill so filed against him: held that this innuendo could not, without the aid of such a colloquium, enlarge the sense of the words, by referring them to the answer averred in the prefatory part of the declaration to have been put in. *Hawkes v. Hawkey*, E. 47 G. 3. 483

SOUTHWARK.

See COURT OF REQUESTS, 1.

SPECIAL DAMAGE.

See EVIDENCE, 13, or SLANDER, 1.

SPECIAL VERDICT.

See PLEADING, 17.

STAMP.

- 1 The Sessions presumed that an indenture of apprenticeship executed 30 years before, and under which the apprentice had regularly served his time for seven years, when the indenture was given up to him, and proved to be lost, and where the parish in which he was settled under such indenture had relieved him the last 12 years, was *properly stamped* in proportion to the apprentice fee of 12*l.* received by

the master; although the deputy registrar and comptroller of the stamp duties proved that it did not appear in that office that any such indenture had been stamped or inrolled during that period. And the judgment of the justices were confirmed in *B. R. The King v. The Inhabitants of Long Buckby*, M. 46 G. 3. 29

- 2 A guarantee in writing for the payment of goods thereafter to be purchased by a third person to a certain amount, is within the exception of the stamp acts, "a contract for or relating to the sale of goods," and need not be stamped. *Warrington v. Furber*, H. 47 G. 3. 399
- 3 Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th of June extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th section of the stat. 35 Geo. 3. c. 63, which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c. *Kensington v. Inglis*, H. 47 G. 3. 413
- 4 A policy effected on "ship and outfit," on a voyage upon the Southern Whale Fishery out and home, cannot be altered by consent after the ship sails and the risk attaches, to an insurance on "ship and goods," without a new stamp; *out-fit*, the subject matter of insurance, being essentially different in such a voyage from *goods*; and therefore not within the exception of the stat. 35 Geo. 3. c. 63. s. 13, which enables alterations to be made in the *terms or conditions* of a policy without having a new stamp, so that the thing insured remains the property of the same persons, &c.

It seems, however, that shifting or successive cargoes on board the same ship in the course of the same adventure, (as in the *African* and other trades) out and home, may be covered by an insurance on *goods*. *Hill v. Patten*, E. 47 G. 3. 459

STATUTE.

See BANKRUPT, 13.

An inclosure act having directed that the allotments made by the commissioners should forever remain for the benefit of the appointees: held that an award and assignment of the *herbage* of a certain close to the surveyors of the highways and their *successors*, for the benefit of the parish of *B.*, though bad as a common law conveyance, the appointees not being a corporation, was yet good as a parliamentary declaration of the persons entitled to take; the same as if the terms of the award had been specifically enacted. And the lord of the manor, in whom the

fee of the soil remained, is a trustee for the surveyors of the highways for the time being. *Jackson v. Hodgson*, M. 47 G. 3. 312

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STOCK BROKER.

See BROKER, No. 2.

STOCK-JOBGING.

The defendant being indebted to the plaintiff in 48*l.* 4*s.* 6*d.*, for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of *November* 1803, when the same would have purchased 90*l.* 16*s.* 7*d.* stock; in consideration of forbearing his action and demand till the 19th of *November* 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 90*l.* 16*s.* 7*d.* stock, with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor within the prohibition of the stock jobbing act 7 G. 2. c. 6. *Mad-dock v. Rumball*, E. 47 G. 3. 427

SUNDAY.

See PRACTICE, 24.

SUPERSEDEAS.

See ERROR, *Writ of*, 11.

SURGEON.

An action on the case lies against a surgeon for gross ignorance and want of skill in his profession, as well as for negligence and carelessness, to the detriment of a patient: though if the evidence be of negligence only; which was properly left to the jury, and negatived by them; the Court will not grant a new trial, because the jury were directed that want of

skill alone would not sustain the action.
Seare v. Prentice, E. 47 G. 3. 448

TAXES.

See HORSE DUTY.

TENANT.

See LANDLORD AND TENANT.

TENDER.

A plea of tender *after* the day of payment of a bill of exchange, and *before* action brought, is not good; though the defendant aver that he was always ready to pay from the time of the tender, and that the sum tendered was the *whole money* then due, owing, or payable to the plaintiff, in respect of the bill, with interest, from the time of the default, *for the damages* sustained by the plaintiff by reason of the non-performance of the promise. *Hume v. Peplos*, H. 47 G. 3. 367

TENURE.

- 1 One may hold the *prima tonsura* of land as *copyhold*, and another may have the soil and every other beneficial enjoyment of it as *freehold*. And ancient admissions of the copyholder, and those under whom he claims the land, by the description of "*tres acras prati*," may be construed only to carry the *prima tonsura*, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes; which was in his own wrong. *Stammers v. Dixon*, H. 46 G. 3. 97
- 2 The *freehold* of an estate, parcel of a manor, and demiseable only by the licence of the lord, passing by surrender and admittance, to which the tenant was admitted by the description of a customary tenement, *habendum* to her and her heirs, *tenendum* of the lord by the rod according to the custom of the manor, by the accustomed rent, suit of court, customs and other services, is in the *lord* and not in the *tenant*; though not holden *ad voluntatem domini*. But such an estate, whether strictly copyhold or not to all purposes, may well pass under the description of *copyhold* in a will; the intention to pass it under that description being apparent. *Doe d. Cook and Wife v. Danvers*, H. 46 G. 3. 142
- 3 Where the tenants of a manor, formerly belonging to a monastery, holding *by border service*, and the defence of *Tynemouth Castle*, under *copy of court roll*, and whose estates passed by *surrender and admittance*, shewed in evidence by surrenders as far back as they existed in writing; by admissions from the 17th Eliz. to the 14th Car. 1; by Exchequer decrees between

the lords and tenants in the times of Eliz. and Jac. 1; and by an inquisition of the jury at the court-baron of the lord in the 2d of Jac. 2; that they were *copyholders of inheritance*, with *finis certain*, holding according to the custom of husbandry of the manor, (or according to the custom of the manor generally,) without stating them to hold at the will of the lord: admitting this evidence to outweigh proof of minister's accounts in the 30th and 31st Hen. 8; a grant of the manor from the crown in the 9th Car. 1, including these estates under the name of *tenements of husbandry*; subsequent means conveyances reserving the coal-mines, &c. in certain districts; and admissions from 1663 to 1777 (including admissions of the several tenants to the estate immediately in question;) in all which they were stated to hold at the will of the lord, as well as according to the custom of husbandry of the manor, &c.: yet as there was evidence for more than a century past that the lord had leased the coal and lime-stone under the copyhold lands in different parts of the manor, and had received rent for the same; and that the lessees of the lord, and not the tenants, had taken the coal and lime-stone; held that such acts of ownership explained the nature of the tenure, according to the custom of husbandry of the manor, &c. and shewed in aid of the other evidence, that the *freehold* was in the lord, and not in the tenants. And at any rate, the evidence preponderating so much in favour of the lord, the Court would not disturb a verdict given for him. *Brown v. Rawlins*, T. 46 G. 3. 196

TIME, LENGTH OF.

See PRESUMPTION. REASONABLE TIME.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush-wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, c. 23, and 12 Ed. 4. c. 7: and the right to convert a brush-wood into a stone weir, is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption; the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld v. Hornby, Clerk*, H. 46 G. 3. 95

TITHE.

In an action on the stat. 2 & 3 Ed. 6. c. 13, for the treble value of tithe corn omitted to be set out, it is not enough for the defendant to shew the existence, *in fact*, of a custom in the parish to set out the 11th instead of the 10th mow; for the validity, as well as existence of such a custom is properly triable in this form of action, though penal in its nature; being given to the party grieved, and his only remedy at common law for subtraction of the tithe due to him. *Phillips v. Davies*, H. 47 G. 3. 372

TITLE.

See **STATUTE**, 1.

TRADE.

See **COVENANT**, 5. (With Enemy.)

See **INSURANCE**, 8.

- 1 Where a licence to trade with an enemy, granted abroad, had been returned, after being used, to the secretary of the governor by whom it was issued, who had, as he believed, thrown it aside amongst the waste papers of his office, and did not know what was become of it; having afterwards searched for, but not recollecting the finding it, and thinking that he had not found it; this is reasonable and probable evidence of the loss of such licence, so as to let in parol evidence of its contents: the paper not being considered as of any further use at the time; and the witness' attention not having been then called particularly to the circumstances. And the witness may speak to the contents of the licence from memory, though he had made an entry of it in his memorandum-book for the private information of himself and the governor; which book was not produced, he having given it to the governor, who was gone abroad without returning it to him: for such book, if in court, would not have been evidence per se; but could only have been used by the witness to refresh his memory. *Kensington v. Inglis*, H. 47 G. 3. 413
- 2 Goods and specie to a certain amount having been insured by a policy on ship or ships which should sail on the voyage insured between the 1st of October 1799 and the 1st of June 1800; a memorandum written on the policy on the 11th June, extending the time of sailing to the 1st of August 1800, does not require a new stamp; being within the 13th sect. of the stat. 35 G. 3. c. 63, which provides that the act imposing the stamp shall not extend to prohibit the making any lawful alteration in the *terms or conditions* of any policy, &c. *ib.*
- 3 Where a certain trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships into our colonial ports, was licensed by

the king's authority; held that an insurance on the *enemy's ship*, as well as on the goods and specie put on board for the benefit of the *British* subjects, was incidentally legalized; and that it was competent for the *British* agent of both parties, in whose name the insurance was effected, to sue upon the policy in time of war; the trust not contravening any rule of law or of public policy, and there being no personal disability in the plaintiff on the record to sue. *ib.*

TRESPASS.

See **LANDLORD AND TENANT**, 8.

- 1 Trespass lies not against magistrates acting upon a complaint made to them on oath, by the terms of which they have jurisdiction; though the real facts of the case might not have supported such complaint; if such facts were not laid before them at the time by the party complained against, having notice of such complaint, and being properly summoned to attend. *Louther v. The Earl of Radnor*, M. 47 G. 3. 344
- 2 Under the 19th section of the general highway act, 13 G. 3. c. 78, a new highway must be set out before an old one can be stopped up; and it is not sufficient that another old highway was widened in parts to answer the purpose of a new road. And if a new highway be not set out before the old one be stopped up, the legality of the orders of the justices for diverting the old road and stopping it up may be questioned in an action of trespass, notwithstanding such orders were confirmed by the Sessions on appeal, stating the fact of a new road being set out in lieu of the old one. *Welch v. Nash*, E. 47 G. 3. 469
- 3 The defendant cannot justify under the general issue in trespass the cutting the posts and rails of the *plaintiff*, though erected upon the defendant's own land; there being no question raised as to the property remaining in the plaintiff. *ib.*

TRIAL.

See **MANDAMUS**, 7, or **PRACTICE**, 13.

TROVER.

Where a broker pledges the goods of his principal as his own, the pawnee who claims by such tortious act of the broker cannot claim to retain against the principal, in trover, for the amount of the lien which the broker had on the goods for his general balance at the time of such pledge. It may be otherwise where one who has a lien delivers the goods to a third person as a security, with notice of his lien, and appoints him to continue his possession, as his servant, for the preservation of his lien. *M'Combie v. Davis*, M. 46 G. 3.

TRUST AND TRUSTEES.

See ALIEN ENEMY, 1.

- 1 *A.*, tenant for life, remainder to his son *B.* in tail, *reversion to himself in fee*, agreed with *B.* in order to relieve themselves from their debts, to bar the entail: and in 1773 they conveyed estates in *N.* and *L.* to the use of trustees and their heirs, in trust to sell the *N.* estates and pay the debts, &c.; and as to the *L.* estate (the only one in question,) in trust that the trustees should, *with the consent of A. and his wife, and of B., or the survivor, sell the inheritance in fee*, and apply the purchase-money on the trusts after mentioned: with a proviso that the *rents, issues, and profits, should, until sale of the inheritance*, be received by such person and for such uses as they would have been, if the deed had not been made and no fines levied. And as to the money arising from the sale of *L.* estate, in trust to invest the same, with the like consent, in the purchase of other lands in fee, to be settled, subject to certain charges, on *A.* for life, remainder to *B. in fee.* Held,

1st, That the use of the *L.* estate was immediately executed in the trustees, even before any consent given to the sale of it by *A.* &c.; and that notwithstanding the proviso, which stipulated only for the receipt, by the party before entitled, of the *rents, &c.*, as contradistinguished from the legal estate of the inheritance, which was left in the trustees. And that this was not a mere *power of sale* in the trustees tacked to the legal estate of the owner.

2dly, That though *A.*, who survived his wife and *B.*, continued in possession of the *L.* estate down to 1795, when he sold it, and died some time after; and though, after the sale of the *N.* estate in 1774, for the payment of the debts, the trustees of the *L.* estate never interfered in further execution of the trust during *A.*'s lifetime, but brought ejectment after his death; yet that no presumption could be made at the trial in favour of the defendants, who purchased from *A.* in 1795, for a valuable consideration, without notice, either that the trustees had re-conveyed the legal estate to *A.* in his lifetime, as upon a satisfied trust, according to the old uses: or had conveyed a new estate to him as a purchaser under a sale by them in execution of their trust. For a court of law will never presume a re-conveyance by trustees where such re-conveyance would be a breach of their trust; which would be the case here upon a supposition that *B.*, the son, was a purchaser for a valuable consideration of the remainder in fee, which was to be limited to him upon the settlement of the new estate to be acquired with the purchase-money of the *L.* estate. Nor is such a presumption to be made in the first in-

stance, even in the case of a doubtful equity, before a court of equity has declared in favour of the equitable title of the party for whom such presumption is required. Nor was there any evidence to support a presumption that *A.* had purchased a new estate of the trustees.

3dly, That *A.*'s possession and receipt of the rents, issues, and profits of the *L.* estate, though for above 20 years after the creation of the trust, without any interference of the trustees, did not shew his possession to be adverse to their title, so as to bar their ejectment against his grantees; such possession and receipt being consistent with and secured to him by the deed of trust. *Keen v. Deardon*, H. 47 G. 3. 402

- 2 A mere equitable interest in a term of years cannot be taken in execution by the sheriff under a writ of fieri facias at the suit of a judgment creditor. *Scott v. Scholey*, T. 47 G. 3. 501

TRUST, DECLARATION OF.

See COPYHOLD, &c. No. 5.

TRUSTEE.

See BAIL-BOND, No. 1. COPYHOLD AND CUSTOMARY ESTATES, No. 1.

TRUSTEES OF INHERITANCE.

See DEVISE, No. 1.

USAGE.

One may hold the prima tonsura of land as copyhold, and another may have the soil and other beneficial enjoyment of it as freehold: and ancient admissions of the copyholder and those under whom he claims the land by the description of "tres acras prati," may be construed only to carry the prima tonsura, if in fact they have enjoyed no more under such admissions, while another has had the after-crop, and has cut the trees and fences, scoured the ditches, repaired the fences, and kept the drains; though the copyholder may have paid all the rates and taxes; which was in his own wrong. *Stammers v. Dixon*, H. 46 G. 3. 97

USURY.

- 1 The defendant being indebted to the plaintiff in 486l. 4s. 6d. for which he was sued; and the plaintiff wishing to invest the amount of the debt in stock on the 19th of Nov. 1803, when the same would have purchased 908l. 16s. 7d. stock; in consideration of forbearing his action and demand till the 19th of Nov. 1804, takes bond from the defendant, conditioned for the transfer by him to the plaintiff on that day of 908l. 16s. 7d. stock, with such interest as the same would have produced, as such stock, in the mean time: held that this was neither usurious, nor with-

in the prohibition of the stock-jobbing act, 7 Geo. 2. c. 8. *Maddock v. Rumball*, E. 47 G. 3. 427

2 Money paid by *A.* to *B.*, in order to compromise a qui tam action of usury brought by *B.* against *A.*, on the ground of an usurious transaction between the latter and one *E.*, may be recovered back in an action by *A.* for money had and received. For the prohibition and penalties of the stat. 18 Eliz. c. 5, attach only on the "informer or plaintiff, or other person suing out process in the penal action, making composition," &c. contrary to the statute; and not upon the party paying the composition; and therefore the latter does not stand, in this respect, in pari delicto, nor is particeps criminis with such compounding informer or plaintiff. *Williams v. Hedley*, E. 47 G. 3. 461

3 And such recovery may be had, although *E.*'s assignees had before recovered from *B.* the money so received by him, as money received to their use (the money paid by way of composition being at the time stated to be *E.*'s money;) there being no evidence at the trial of this cause to shew that *A.* the present plaintiff was privy to that suit. *ib.*

VENDOR AND VENDEE.

1 Where the legal title to a ship remained for a month after the sale in the vendors upon the face of the register, by reason of the vendee having omitted for so long to deliver a copy of the indorsement of the transfer on the original certificate of registry to the proper officer authorized to make registry, &c. pursuant to the stat. 34 G. 3. c. 69. s. 15; yet the vendors are not liable during that interval for repairs ordered by the captain under the direction of the vendee, (who for this purpose must be considered as a stranger to the legal owners,) and consequently had no authority express or implied to bind them. *Young v. Brander*, M. 47 G. 3. 299

2 The vendee of goods having accepted a bill of exchange for the price of them, and becoming bankrupt before the bill became due, the guarantee who paid the vendor after the bankruptcy of the vendee may recover back the money from the latter, without proving that any demand was made upon him as acceptor of the bill, before such payment by the guarantee; this not being an action upon the bill itself; and the notorious insolvency of the vendee acceptor being at least a prima facie warrant to the guarantee to dispense with the making of such demand by the vendor who held the bill; however it might still be competent for the vendee to defend himself against this action by the guarantee, by shewing that if a demand for payment had been made upon him by the holder, the bill would have

been paid. *Warrington v. Furber*, H. 47 G. 3. 399

VENUE.

See EVIDENCE, No. 1. POOR REMOVAL, No. 2.

1 The publisher of a public register receives an anonymous letter, tendering certain political information on *Irish* affairs, and requiring to know to whom his letters should be directed; to which answer is returned in the register; after which he receives two letters in the same hand-writing directed as mentioned, and having the *Irish* post mark on the envelopes; which two letters were proved to be in the hand-writing of the defendant; the previous letter having been destroyed. This is a sufficient ground for the Court to have the letters read: and the letters themselves containing expressions of the writer indicative of his having sent them to the publisher of the register in *Middlesex* for the purpose of publication, the whole is evidence sufficient for the jury to find a publication by the procurement of the defendant in *Middlesex*. *Rez v. The Hon. Robt. Johnson*, M. 46 G. 3. 38

2 In covenant upon a lease, a view being proper to be had, the venue was changed to the county where the premises lay; though most of the plaintiff's witnesses resided in the county where the venue was laid. *Hodinott v. Coz*, H. 47 G. 3. 411

VERDICT.

After verdict in ejectment for a message and tenement, the Court will give leave to enter the verdict, according to the Judge's notes, for the message only, (pending a rule to arrest the judgment), without obliging the lessor of the plaintiff to release the damages. *Goodtitle v. Otway*, E. 47 G. 3. 451

VILL.

See HUNDRED, 1.

VISITOR.

Where the founder of a hospital directed that if in making up the accounts of the wardens biennially going out of the office, any doubt should arise, which could not be decided by the new wardens, &c. the ordinary should decide it: and also gave to him the appointment of a master, upon the default of other persons to appoint with certain times; and power to correct or remove the master for certain causes, and also power to sequester the profits of the wardens, &c. in case of the improper subtraction of a certain sum directed to be kept in a chest for special purposes, until the money was replaced; and also gave to the ordinary the power of interpreting the statutes in case of any doubt:

and the founder also delegated to the dean and chapter of York power to remove the wardens, &c. consenting to mortgage or alienate the lands of the charity: held that none of the powers so delegated constituted a *visitor*, so as to exclude the application of the powers granted by the stat. 43 Eliz. c. 4: and consequently that a commission of charitable uses issued out of the Court of Chancery under that act was valid. *Kirkby Ravensworth Hospital Case*, H. 47 G. 3. 390

VOLUNTEERS.

Volunteer drill serjeants, &c. though subject to the regulations of the mutiny act for trial and punishment by volunteer courts martial according to the statute 44 Geo. 3. c. 54. s. 21, are not privileged from arrest for debts under 20*l*. as regular soldiers. *Rickman v. Studwick*, M. 47 G. 3. 341

WAGES.

See SEAMEN, 2.

WARRANT.

- 1 The warrant of commissioners of bankrupt for the arrest of a witness, in order to examine him, may issue after his disobedience to the first summons. *Battye v. Greasley*, E. 47 G. 3. 434
- 2 The propriety of granting such warrant being an act of discretion, must be determined upon by the commissioners acting together at the time. And their order to their officer to make out the warrant must be taken to include their direction as to the persons to whom it is to be directed: but the mere act of signing the names of the commissioners to the warrant may be done by them separately. *ib.*

WARRANTY.

- 1 After a warranty of a horse as sound the vendor in a subsequent conversation said, that *if the horse were unsound* (which he denied) *he would take it again and return the money*. This is no abandonment of the original contract, which still remains open: and though the horse be unsound the vendee must sue upon the warranty, and cannot maintain assumpsit for money had and received to recover back the price, after a tender of the horse. *Payne v. Whale*, H. 46 G. 3. 131
- 2 Where the whole consideration of a promise is truly stated, and also all such parts of the promise itself, the breach of which is complained of; it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. As where the plaintiff declared, that in consideration of his re-delivery to the defendant of an unsound horse, which he had before then sold to the plaintiff,

the defendant promised to deliver to him another horse in lieu, &c. which should be worth 80*l*. and be a *young horse*; and then alleged a breach in both those respects: held sufficient; though the proof were not only of a promise that the second horse should be worth 80*l*. (which it was not) and be a young horse, but also of a warranty that it was *sound* and *had never been in harness*. *Miles v. Sheward*, M. 47 G. 3. 298

WASTE.

If trees be excepted out of a demise, *waste* cannot be committed by cutting them down; and therefore ejectment cannot be brought as for waste committed in or upon the demised premises. *Goodright v. Vivian*, H. 47 G. 3. 377

WAY.

See HIGHWAY.

- 1 One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years. *Allen v. Ormond*, M. 47 G. 3. 296
- 2 The terminus ad quem, being laid to be a *public highway*, is proved by evidence of a *public footway*, though such description of the terminus might have been bad on special demurrer, as not being sufficiently certain. *ib.*

WEST INDIA DOCK COMPANY.

The stat. 39 Geo. 3. c. 69. s. 137, gives to the *West India Dock Company* certain rates and duties for all goods imported from the *West Indies* which shall be landed, &c. from on board any ship entering into and using the docks; which rates are directed to be "accepted for the use of the docks, and the quays, wharfs, and cranes, and other machines belonging thereto, and the land-waiters' fees on account of such goods after being unshipped, and all charges and expences of wharfage, landing, housing, and weighing such goods, and of such cooperage as the same may want after being unshipped, and all rent for warehouse room for twelve weeks, and all charges of delivering the same from the said warehouses." The latter words include a delivery of the goods into lighters in the dock, as well as an immediate delivery from the warehouses into land carriages placed under the cranes of the warehouses; although for the purpose of such delivery into lighters it be necessary to put the goods upon trucks, in order to carry them across the quay, and afterwards to crane them into the lighters. But it seems that if the owner require any work to be done upon the goods, *ultra* the mere transitus of them from the warehouse to the lighter, the

Company are entitled to an extra compensation to be settled by convention between the parties, as in other cases out of the act. *Harden v. Smith*, M. 47 G. 3.

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WEIR.

Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brush wood, through which it is possible for the fish to escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape through the weir is debarred; though in flood times the fish may still overleap it. The enhancing, straitening, or enlarging of an ancient weir, as well as the new erection of one, for the purpose of stopping fish in their passage up a river, is treated as a public nuisance by *Magna Charta*, c. 23, and 12 Ed. 4. c. 7, and the right to convert a brush wood into a stone weir is not evidenced by shewing that 40 years ago two-thirds of it had been so converted, without interruption: the action for the injury having been brought within 20 years after the remaining third part was so converted. *Weld v. Hornby*, Clerk, H. 46 G. 3.

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WILL.

1 A copyhold or customary estate, the freehold of which is in the lord and not in the tenant, and which passes by surrender and admittance, is not within the 5th section of the statute of frauds, 29 Car. 2. c. 3, so as to require to a devise of it the signature of the party, or the attestation of witnesses. Nor is it within the 7th section, as a declaration of trust, requiring to be proved by a writing signed by the party; which applies only to cases where the legal and equitable estates are separated; or by a will in writing; which must be understood only of such a will of lands as the statute recognizes, viz. a will attested by three or four witnesses. But held that it might well pass by instructions for a will taken in writing by another, in the presence and from the oral dictation of the party; though without any signature or attestation; which was established as her will by the ecclesiastical court granting probate thereof, and is a good will under the statute of wills; the estate having been surrendered to the use of her last will in writing. *Dos, d. Cook and Wife v. Danvers*, H. 46 G. 3.

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2 Such estates pass not by the will alone, but by the will and surrender taken together. *ib.*

WITNESS.

See DEPOSITION, MANDAMUS, 7. or PRACTICE, 13.

1 A witness cannot be cross-examined as to any collateral independent fact irrelevant to the matter in issue, for the purpose of contradicting him if his answer be one way by another witness, in order to discredit the whole of his testimony. *Spenceley q. t. v. De Willott*, H. 46 G. 3.

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2 An attorney is bound to disclose, when called as a witness by the adverse party, the contents of a notice which he received to produce a paper in the hands of his client; the privilege of the client only extending to exclude the disclosure of any fact communicated confidentially to the witness in the character of his attorney. *Spenceley, qui tam, v. Schulenburg*, E. 46 G. 3.

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3 The party interested in a witness's testimony, who was objected to, on account of his having been convicted of felony, and his imprisonment being unexpired, is entitled to insist on proof of such conviction by the record, though admitted by the witness himself. *The King v. The Inhabitants of Castell Carcinion*, M. 47 G. 3.

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4 Under the stat. 1 Jac. 1. c. 15. s. 10 and 11, it is not necessary, upon summoning a witness before commissioners of bankrupt to be examined touching the bankrupt's effects, to tender him the expences of his journey before-hand; though if he be in fact without the means of taking the journey it may be an excuse for not obeying the summons: and consequently a warrant issued by the commissioners on account of the non attendance of such witness, without lawful impediment, authorizing his arrest for the purpose of examination, is legal. *Battye v. Gresley*, E. 47 G. 3.

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5 It lies on the party so summoned, having a lawful excuse for not attending, to prove the fact in an action of trespass and false imprisonment, brought by him for such arrest; admitting that an inability to bear the expence of the journey is a lawful impediment. *ib.*

6 Such warrant for the arrest of the witness in order to examine him, may issue after his disobedience to the first summons. *ib.*

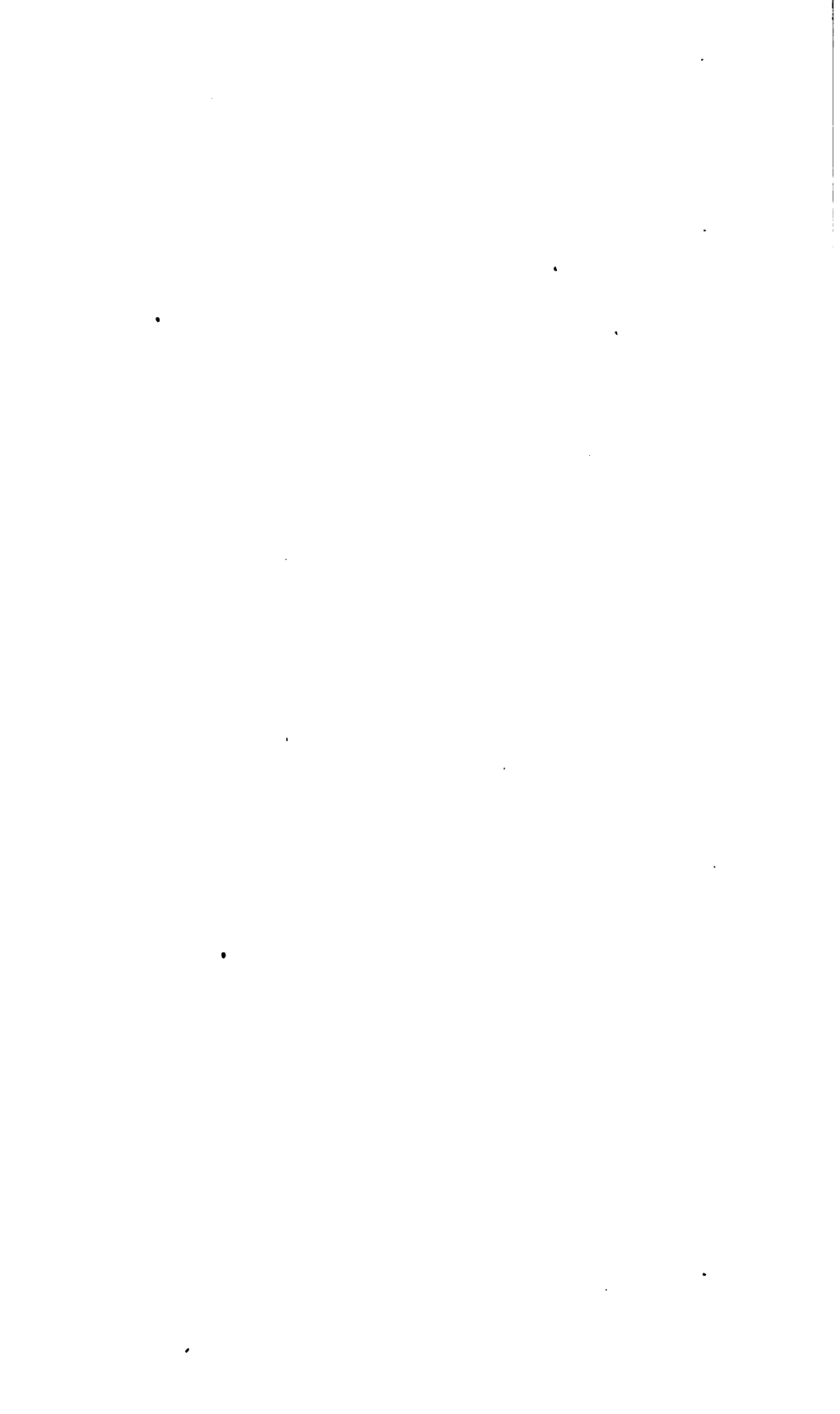
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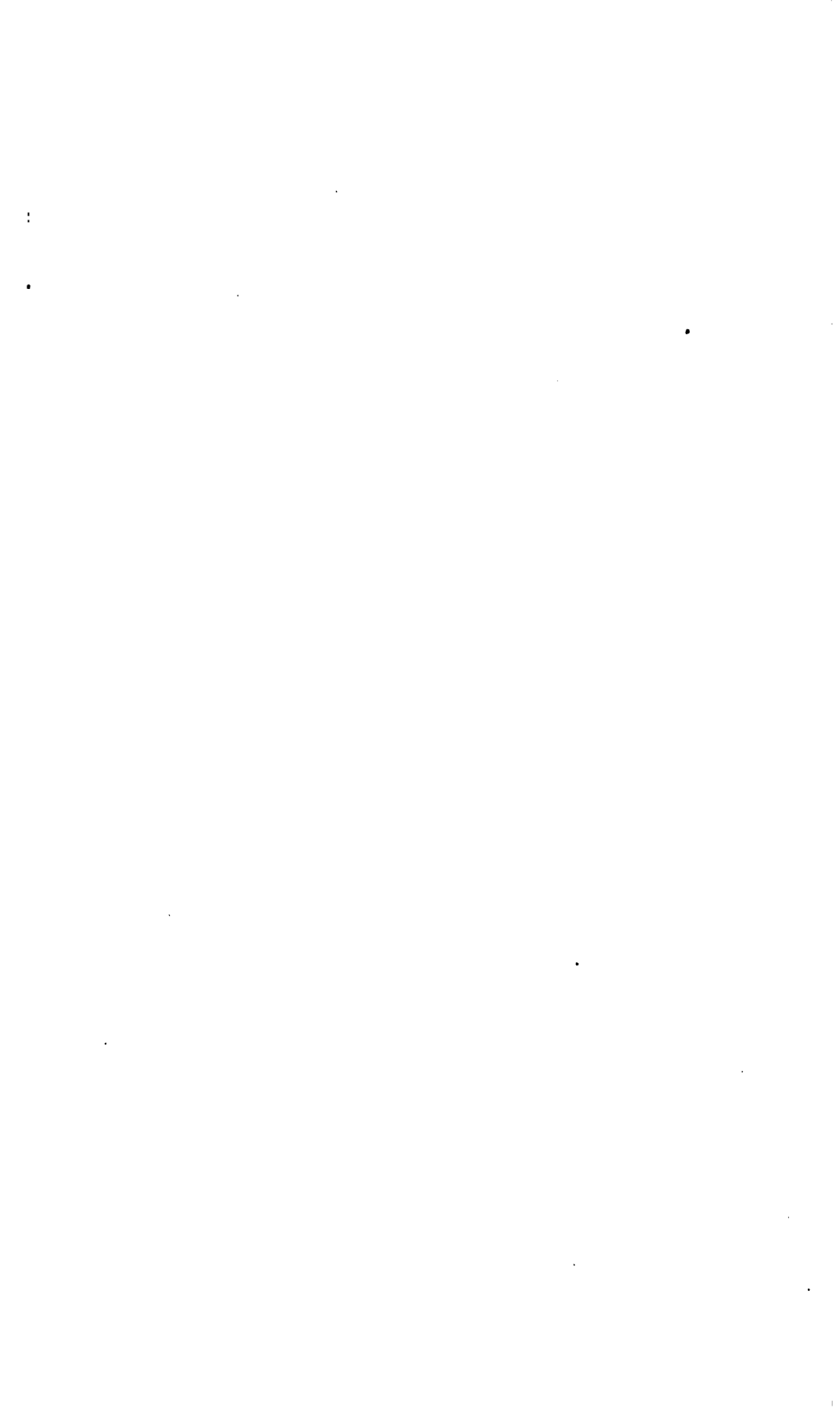
See SETTLEMENT BY OFFICE.

WRIT OF ERROR.

See ERROR, Writ of.









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